109-669

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 970.

A. AUSTIN SMITH, PLAINTIFF IN ERROR,

vs.

SAMUEL C. GREENHOW.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED SEPTEMBER 22, 1883.

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INDEX.

	Original.	Print.
Caption	1	1
Transcript from State Court filed	1	1
Summons	2	1
Declaration	3	2
Defendant's Plea	4	2
Replication	7	3
Rejoinder	10	5
Demurrer to Rejoinder	12	5
Petition for removal of cause	12	6
Bond " " " "	14	6
Clerk's Certificate	16	7
Consent of Defendant to docket cause in Circuit Court of the United States	16	7
Judgment	17	8
Writ of Error	18	8
Citation	19	9
Bond	21	10
Assignment of error and prayer for reversal	23	11
Opinion	24	11
Clerk's Certificate	53	23

1 In the Circuit Court of the United States for the Fourth Judicial Circuit and Eastern District of Virginia.

RICHMOND, VA., *September 4th*, 1883.

A. AUSTIN SMITH
vs.
SAMUEL C. GREENHOW. } No. 1442. Trespass.

Be it remembered, that on the 10th day of May, 1883, came the plaintiff, by his attorney, and filed in the clerk's office of the circuit court of the United States for the eastern district of Virginia a record from the circuit court of the city of Richmond, which record is in words and figures as follows:

Record.

VIRGINIA: In the Circuit Court of the city of Richmond.

Be it remembered, that on the 2d day of May, 1883, came A. Austin Smith and sued out of the clerk's office of said court a writ against Samuel C. Greenhow, which writ, together with the return thereon, is in the words and figures following, to wit:

2 *Writ.*

The Commonwealth of Virginia to the Sheriff of the city of Richmond, greeting:

We command you to summon Samuel C. Greenhow to appear at the clerk's office of our circuit court of the city of Richmond, at the court-room of said court in said city, at rules to be holden for said court on the first Monday in May, 1883, to answer the action of A. Austin Smith of a plea of trespass—damage, six thousand dollars—and have then there this writ. Witness, Alfred Sheild, clerk of our said court at Richmond, the 2d day of May, 1883, and in the 107th year of the Commonwealth.

ALFRED SHEILD.

Return.

"I acknowledge service of the within writ, this 2d day of May, 1883.

"SAM'L C. GREENHOW,
"BY S. B. WITT, *Com. Att'y*
"*for City of Richmond.*"

And at another day, to wit: At rules held in the clerk's office of said court on the first Monday in May, 1883, came the plaintiff and filed his declaration against the defendant, which
3 is in the words and figures following, to wit:

Declaration.

Circuit Court for the city of Richmond:

A. AUSTIN SMITH *vs.* SAMUEL C. GREENHOW.

A. Austin Smith, plaintiff, complains of Sam'l C. Greenhow, defendant, of a plea of trespass, for this, to wit, that heretofore, to wit, on the 1st day of May, 1883, the said defendant, with force and arms, did unlawfully and against the will of the said plaintiff enter upon the premises and into the place of business of the said plaintiff, which said premises and place of business are situate and being within the corporate limits of the city of Richmond, in the State of Virginia, and the said defendant being as aforesaid within and upon the premises and in the place of business aforesaid of the said plaintiff, he the said defendant, with force and arms, and against the will of the said plaintiff, did unlawfully seize, take, and carry away divers goods and chattels, to wit, one table and one book-case, with the books therein, of great
4 value, to wit, of the value of one hundred dollars, the property of the plaintiff, and the said defendant being then and there on the premises and in the place of business of the said plaintiff, remained there for a long time, notwithstanding the plaintiff's request that he should leave, by means of which conduct of the defendant, and the premises aforesaid, the plaintiff was, during all the time aforesaid, greatly disturbed and annoyed in the peaceable possession of his said place of business, and was, during that time, hindered and prevented from carrying on and transacting therein his lawful and necessary affairs and business, and other wrongs and injuries to the said plaintiff, the said defendant then and there did, to the damage of the said plaintiff six thousand dollars.

WM. L. ROYALL,
E. C. MINOR, *P. Q.*

And on the same day, to wit, at rules held in the clerk's office of the said court, on the first Monday in May, 1883, came the defendant and filed a special plea in writing to the plaintiff's declaration; which plea is in the words and figures following, to wit:

Def'ts Plea.

"Circuit Court of the city of Richmond:

5 "SAMUEL C. GREENHOW *ads.* A. AUSTIN SMITH.

"And the said defendant, by his attorney, comes and defends the force and injury complained of, and says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that before and at the time when the supposed trespasses complained of in the plaintiff's declaration

were supposed to have been committed, the plaintiff was a resident of the city of Richmond, in the State of Virginia, and owed taxes to said State for the year 1882, with which taxes he had been lawfully assessed on property owned by him in said city, that the defendant is the treasurer of the city of Richmond, in the State of Virginia, and that he is charged by the laws of the State of Virginia with the duty of collecting all taxes due by residents of said city to the State of Virginia lawfully assessed on property owned by such residents in said city. That the taxes owed by said plaintiff to the said State as aforesaid were due and payable prior to the first day of December, 1882, and that
6 by the laws of said State it became the duty of this defendant to levy for said taxes after said first day of December, 1882. That the defendant has many times, since the first day of December, 1882, called upon the said plaintiff and demanded of him payment of his said taxes, but the said plaintiff has always neglected and refused to pay the same, and did neglect and refuse to pay the same up to the time when the supposed trespass is alleged to have been committed. That the plaintiff being so in default at the time mentioned in the declaration, the defendant, as was his duty under the laws of Virginia, entered upon the premises and into the place of business of the plaintiff to levy upon the property of the plaintiff to satisfy said taxes due as aforesaid, and that he took and carried away the personal property mentioned in the plaintiff's declaration for the purpose of selling the same, according to law, to satisfy the said taxes due by the plaintiff. That the defendant used no more force than was necessary to make said levy, and he did not remain upon the plaintiff's premises longer than was necessary to make said
7 levy, and that the defendant committed no outrage or wrong, whilst upon the plaintiff's premises, upon the plaintiff or his property. That the foregoing are the supposed trespasses mentioned in plaintiff's declaration, whereof the said plaintiff hath complained against the said defendant, and this the said defendant is ready to verify.

"Wherefore he prays judgment if the said plaintiff ought to have or maintain his action aforesaid against him.

"SAM'L C. GREENHOW,
"By S. B. WITT,
"*Com. Att'y for City of Richmond.*"

And on the same day, to wit, at rules held in the clerk's office of said court, on the first Monday in May, 1883, came again the plaintiff, by his attorney, and filed his replication to the defendant's plea to his declaration, which replication is in the words and figures following, to wit:

Plaintiff's Replication to Defendant's Plea.

"Circuit Court of the City of Richmond.

"A. AUSTIN SMITH *vs.* SAMUEL C. GREENHOW.

"And the said plaintiff, as to the said plea of the defend-
8 ant above pleaded, says that he, the said plaintiff, by reason of anything by the said defendant in that the plea alleged ought not to be barred from having and maintaining his aforesaid action thereof against him, the said defendant, because he saith that on many and divers occasions prior to the first day of May, 1883, he tendered and offered to the said defendant, as treasurer and collector of taxes for the city of Richmond, in payment of his taxes—stated in the defendant's plea to be due by him, the plaintiff, to the State of Virginia—coupons cut from bonds issued by the State of Virginia under authority of and by virtue of the act of the General Assembly of the State of Virginia, approved March 28th, 1879, entitled 'An act to provide a plan of settlement of the public debt;' all of which coupons contained upon their faces the promise of the State of Virginia that they should be received in payment of all taxes due to the said State, and all of which were due and past maturity, and amounted exactly to the sum due as aforesaid by the plaintiff to the said State of Virginia for his said taxes for the year
9 1882; and he, the said plaintiff, on the said first day of May, 1883, prior to the time when the defendant unlawfully entered upon his said premises, again tendered the said coupons to the said treasurer, the defendant, in payment of his said taxes, but the said defendant refused to receive the same in payment of his, the plaintiff's, taxes, notwithstanding the said tender so made by him, and unlawfully entered upon the plaintiff's premises thereafter, and committed the trespasses complained of in the declaration aforesaid, although the plaintiff was always after said tender ready and willing to deliver the said coupons to the said defendant in payment of his said taxes; and this he, the said plaintiff, is ready to verify, and he prays judgment, and his damages by him sustained, by reason of the committing of the said trespasses, to be assessed to him.

"WM. L. ROYALL,
"E. C. MINOR, *P. Q.*"

And on the same day, to wit: At rules held in the clerk's office of the said court on the 1st Monday in May, 1883,
10 came the defendant and filed his rejoinder to the plaintiff's replication, which is in the words and figures following, to wit:

Defendant's Rejoinder.

Circuit Court of the City of Richmond.

SAMUEL C. GREENHOW *ads.* A. AUSTIN SMITH.

And the said defendant, as to the said replication of the said plaintiff, saith that he, the said plaintiff, ought not, by reason of anything by him in that replication above alleged, to have or maintain his aforesaid action against him, the said defendant, in respect to the said supposed trespasses in the said declaration mentioned, because he saith that heretofore, to wit: On the 26th day of January, 1882, the General Assembly of the State of Virginia enacted a statute, entitled "An act to provide for the more efficient collection of the revenue to support *government*, maintain the public schools, and to pay interest on the public debt," which is chapter 41 of the published laws of the State of Virginia for the year 1882, which act commands the several tax-collec-
11 tors of the State of Virginia to receive in discharge of the taxes due to the said State, gold, silver, United States treasury notes, and national bank currency, and nothing else; and that this defendant was thereby forbidden to receive the coupons tendered by the said plaintiff in payment of the said taxes due by him to the State of Virginia; and that the said plaintiff not having paid his said taxes in gold, silver, United States treasury notes, or national bank currency, or offered to do so, it became the duty of the defendant, as treasurer of the city of Richmond, under the laws of Virginia, to levy upon the plaintiff's property to satisfy the said taxes due by him. Wherefore, as before, he prays *judgment* if the plaintiff ought to have or maintain his aforesaid action against him in respect to the aforesaid supposed trespass in the declaration mentioned.

SAM'L C. GREENHOW,
By S. B. WITT,
Com. Attorney for City of Richmond.

And on the same day, to wit, at rules held in the clerk's office of the said court on the 1st Monday in May, 1883, came the
12 plaintiff and filed his demurrer to the defendant's rejoinder, which is in the words and figures following, to wit:

Plaintiff's Demurrer to Def'ts Rejoinder.

Circuit Court for the City of Richmond.

A. AUSTIN SMITH *vs.* SAM'L C. GREENHOW.

The plaintiff says that the defendant's rejoinder is not sufficient in law.

WM. L. ROYALL,
E. C. MINOR, *P. Q.*

And the defendant joined in the plaintiff's demurrer.

And on the same day, to wit, at rules held in the clerk's office of said court, on the first Monday in May, 1883, came the plaintiff and filed his petition asking the removal of this cause; which petition is in the words and figures following, to wit:

Petition.

Circuit Court of the City of Richmond:

A. AUSTIN SMITH *vs.* SAMUEL C. GREENHOW.

The petition of A. Austin Smith respectfully represents that he commenced an action against the defendant in this court for a trespass, claiming $6,000 damages, by summoning the defendant to May rules, 1883; that the defendant appeared and
13 filed his plea at said May rules; that your petitioner filed his replication to said plea at said May rules, and the defendant filed his rejoinder to said replication at said May rules, and that the plaintiff filed his demurrer to said rejoinder at said May rules, in which the defendant joined, and that the plaintiff and defendant consented that this cause should be placed upon the docket for trial at the next ensuing term of the court; that the next term of this court commences on the 21st day of May, 1883.

Your petitioner would respectfully show that by inspecting the pleadings and proceedings in this suit, it will appear that it arises under the Constitution of the United States, and is, therefore, removable by either party to the circuit court of the United States for the eastern district of Virginia.

Your petitioner makes and files herewith a bond, with good and sufficient surety, for his entering into the circuit court of the United States for the eastern district of Virginia on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said circuit court shall hold that this suit has been wrongfully
14 or improperly removed. Your petitioner therefore prays this honorable court to accept this petition and said bond, and order the transfer of this suit to said circuit court of the United States for the eastern district of Virginia.

A. AUSTIN SMITH.

WM. L. ROYALL,
Attorney for Petitioner.

And thereupon the plaintiff made and filed a bond, with good and sufficient security, before the clerk of this court, which bond is in the words and figures following, to wit:

Bond.

Know all men by these presents, that we, A. Austin Smith, as principal, and Richard L. Maury, as surety, are held and firmly bound to Samuel C. Greenhow in the penal sum of five hundred dollars, for the payment whereof well and truly to be made unto the said Samuel C. Greenhow, his heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents. Yet upon these conditions the said A. Austin Smith having petitioned the
15 circuit court of the city of Richmond for the removal of a certain cause therein pending, wherein the said A. Austin Smith is plaintiff and the said Samuel C. Greenhow is defendant, to the circuit court of the United States for the eastern district of Virginia.

Now, if the said A. Austin Smith, the petitioner, shall enter in the said circuit court of the United States for the eastern district of Virginia, on the first day of its next session, a copy of the *the* record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said circuit court shall hold that said snit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise in full force and virtue.

Witness our hands and seals, this 7th day of May, 1883.

A. AUSTIN SMITH, [SEAL.]
RICHARD L. MAURY, [SEAL.]

Executed before me,
ALFRED SHEILD, *Cl'k.*

STATE OF VIRGINIA, *City of Richmond, to wit:*

This day, Richard L. Maury, personally appeared before me, Alfred Shield, clerk of the circuit court of the city of
16 Richmond, and made oath that he is worth the sum of five hundred dollars.

Given under my hand, this 7th day of May, 1883.

ALFRED SHEILD, *Cl'k.*

The foregoing is a copy of all the proceedings in the above case, at rules, held in the clerk's office of the circuit court of the city of Richmond.

Test: ALFRED SHEILD, *Cl'k.*
Fee $3.90.

I consent that this cause shall be placed upon the docket of the circuit court of the United States for trial at its present term, but subject to all objections to the jurisdiction of the court, and subject to all rights to move to move to remand the same to the

State court, which could be made if this consent had not been given.

S. C. GREENHOW,
By S. B. WITT,
Com. Atty. for City of Richmond.

And, now, at this day, to wit: At a circuit court of the
17 United States for the eastern district of Virginia, held at Richmond, in said district, on the 4th day of September, 1883.

A. AUSTIN SMITH *vs.* SAMUEL C. GREENHOW.

This cause came on this day to be heard upon a motion made by the defendant to remand the same to the circuit court of the city of Richmond, Virginia, and the court, being of opinion that the plaintiff has no right under the law to remove this cause from the circuit court of the city of Richmond, Virginia, to this court, it is *Ordered*, that this cause be, and the same hereby is, stricken from the docket of this court, and the same is hereby remanded to the circuit court of the city of Richmond.

HUGH L. BOND,
C't Judge.

September 4th, 1883.

18 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the Circuit Court of the United States for the Eastern District of Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the order or judgment of a plea which is in the said circuit court, before you, between A. Austin Smith, plaintiff, and Samuel C. Greenhow, defendant, a manifest error hath happened, to the great damage of the said A. Austin Smith, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the eighth day of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of

the said Supreme Court, the eighth day of September, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] M. F. PLEASANTS,
Clerk of the Circuit Court of the United States for the East. District of Virginia.

Allowed by—
HUGH L. BOND, *C't Judge.*

I, M. F. Pleasants, clerk, hereby certify that a true copy of the above writ of error remains on file in the papers of the cause in my office.

M. F. PLEASANTS, *Clerk.*

19 The United States of America to Samuel C. Greenhow, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the eighth (8th) day of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the eastern district of Virginia, wherein A. Austin Smith is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment or order rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this eighth day of September, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] HUGH L. BOND, *C't Judge.*

I, M. F. Pleasants, clerk, hereby certify that a true copy of the above citation remains on file in the papers of this cause in my office.

M. F. PLEASANTS, *Clerk.*

20 I hereby acknowledge service of a copy of the within citation and consent that this cause may be docketed at once in the Supreme Court of the United States, to be heard and decided at the term of that court beginning in October, 1883, and since I cannot know what my duties and powers are as collector of State taxes until this cause and others involving similar questions are decided, I earnestly request the Supreme Court of the United States to hear and decide it and them, as soon as its convenience will permit it.

September 8th, 1883. S. C. GREENHOW.

STATE OF VIRGINIA, *City of Richmond, to wit:*

This day, C. M. Ragland, personally appeared before me, J. M. Skinner, a notary public for the city of Richmond, and made oath that he is well acquainted with the handwriting of S. C. Greenhow, who is the treasurer of the city of Richmond, and that the foregoing is his signature.

Given under my hand this 14th day of September, 1883.

[SEAL.] J. M. SKINNER, *N. P.*

21 Know all men by these presents that we, William L. Royall and William R. Trigg, are held and firmly bound unto Samuel C. Greenhow in the full and just sum of five hundred dollars, to be paid to the said Samuel C. Greenhow, his certain attorneys, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighth day of September, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas, lately, at a circuit court of the United States for the eastern district of Virginia, in a suit depending in said court between A. Austin Smith, plaintiff, and Samuel C. Greenhow, defendant, judgment was rendered against the said A. Austin Smith, and the said A. Austin Smith having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the said judgment in the aforesaid suit, and a citation directed to the said Samuel C. Greenhow, citing and admonishing him to be and appear at a Supreme Court
22 of the United States, to be holden at Washington the eighth day of October next.

Now, the condition of the above obligation is such that if the said A. Austin Smith shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WM. L. ROYALL. [SEAL.]
W. R. TRIGG. [SEAL.]

Approved by—
HUGH L. BOND, *C't Judge.*

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, hereby certify that the above is a true copy of the bond filed and remaining in the papers of the cause in the said court.

M. F. PLEASANTS, *Clerk.*

And on another day, to wit: On the fifth day of September, 1883, came the plaintiff, by his attorney, and filed his assignment of error and prayer for reversal, as follows:

Circuit Court of the United States for the Eastern District of Virginia.

A. AUSTIN SMITH *vs.* SAMUEL C. GREENHOW.

Assignment of Error and Prayer for Reversal.

The plaintiff assigns for error the judgment of the court striking his cause from the docket and remanding it to the State court.

The plaintiff prays for a reversal of this judgment or order.

A. AUSTIN SMITH,
BY WM. L. ROYALL,
His Attorney.

The following opinion is filed in this cause by the circuit judge of the fourth circuit and eastern district of Virginia, viz:

Opinion of the Court.

JOHN STEWART
vs.
WILLIAM M. McGRUDER, Treasurer.

JOSEPH BRYAN
vs.
WILLIAM M. McGRUDER, Treasurer.

DANIEL STEWART
vs.
WILLIAM M. McGRUDER, Treasurer.

A. AUSTIN SMITH
vs.
S. C. GREENHOW, Treasurer.

SAMUEL S. CARTER
vs.
S. C. GREENHOW, Treasurer.

In the Circuit Court of the United States for the Eastern District of Virginia.

Of the above-named five suits the *first* and *second* are suits in equity, brought in each case by a citizen of the State of Virginia against the treasurer of Henrico county, in the State of Virginia, to restrain and enjoin the said treasurer from levying on or selling the property of the plaintiff for taxes, in payment of which the plaintiff has tendered coupons of bonds

of the State of Virginia, made receivable for taxes by the laws of Virginia.

The *third* is a suit in equity brought for the same purpose by a citizen of the kingdom of Great Britain and Ireland.

The *fourth* is an action of trespass, brought originally in a State court of Virginia, by a citizen of Virginia, and removed thence to this court.

The *fifth* is an action of trespass, brought originally in this court by a citizen of Virginia, to recover damages of the defendant, the treasurer of the city of Richmond, on the ground that the plaintiff is deprived of a right secured to him by the Constitution of the United States, by a seizure of his property under color of statutes of the State of Virginia.

The *first* and *second* suits, being brought in this court by
26 citizens of the same State, involve a question of jurisdiction which it is necessary to examine and decide.

The jurisdiction of the circuit courts of the United States was originally fixed by section 11 of the act commonly known as the judiciary act of September 24th, 1789, and was expressed in these words:

"That the circuit courts shall have original cognizance concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners; or an alien is a party; or the suit is between a citizen of the State where the suit is brought and a citizen of another State."

The incidents of a suit cognizable in this court under the above section are:

First. A matter in dispute exceeding five hundred dollars.

Second. The United States as plaintiffs; or,

Third. An alien as a party; or,

Fourth. The suit is between a citizen of the State where the suit is brought and a citizen of a different State.

27 In other words, the suit must *in all cases* involve the value of five hundred dollars; but, as to its other incidents, it may be brought in either of three events, viz:

(1.) When the United States are plaintiffs.

(2.) When an alien is a party.

(3.) When the suit is between citizens of different States.

The jurisdiction here defined remained unchanged till the passage of the act of March 3d, 1875, entitled "An act to determine the jurisdiction of the circuit courts," etc., (Supplement to Rev. Stat., Vol. 1, p. 173,) which is in these words:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States,

of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, *arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority*, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States or a controversy between citizens of the
28 same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects."

This section defines the present jurisdiction of this court.

In analyzing this section, we find the jurisdiction is still, as in the original law, limited, in the first instance, to cases where the value in dispute exceeds five hundred dollars, but that a new incident of jurisdiction is then added, viz.:

That the case be one "*arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority.*"

It is perfectly clear that under this act a suit is cognizable in this court, if—

(1.) The value in controversy exceeds five hundred dollars; and

(2.) The case is one "*arising under the Constitution or laws of the United States.*"

In such a case this Court has precisely the same jurisdiction as it would have in a case in which—

(1.) The United States were plaintiffs; or

(2.) In which there was a controversy between citizens of different States; or

29 (3.) Between citizens of the same State claiming lands under grants of different States; or

(4.) Between citizens of a State and foreign States, citizens, or subjects.

We repeat that under this act every case over which the Court can have jurisdiction must, *first*, involve an amount exceeding five hundred dollars; and, *second*, it must have some *one* of these four incidents or characteristics, viz.:

(1.) It must arise under the Constitution or laws of the United States.

(2.) The United States must be plaintiffs.

(3.) There must be a controversy between citizens of different States; or

(4.) Between citizens of a State and foreign States.

If a suit involves a sum of over five hundred dollars, *and* arises under the Constitution or laws of the United States, this Court has jurisdiction, precisely as it would have if a suit involved the sum of over five hundred dollars *and* the United States were

plaintiffs, or if it involved the sum of over five hundred
30 dollars and the controversy were between citizens of different States.

We do not see how anything can be more demonstrably certain than this result; and it is only necessary, in the present cases, to inquire further:

I. What is the meaning of the words, "arising under the Constitution or laws of the United States"? and

II. Whether the present are cases "arising under the Constitution or laws of the United States"?

I. The words, "arising under the Constitution or laws of the United States," are first found in the grant of judicial power contained in Article III, section 2, of the Constitution of the United States, where these words are found:

"The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States," etc.

The entire jurisdiction of the Supreme Court on writs of error to a State court is drawn from this section, which confers on the Supreme Court appellate jurisdiction in all cases "arising under the Constitution or laws of the United States."

31 So that the question, whether a case is reviewable on writ of error from the Supreme Court of the United States to a State court, always turns solely on the question, whether it is a case "arising under the Constitution or laws of the United States."

Hence the terms in which the United States statute defines the cases in which a writ of error will lie to a State court, are an exact definition of the words "arising under the Constitution or laws of the United States."

The language of that statute is as follows:

Final decrees and judgments in the highest court of a State, may be re-examined, etc., in the Supreme Court of the United States, on writ of error, in any suit—

(1.) "Where is drawn in question the validity of a statute of, or an authority exercised under, the United States, and the decision is against their validity; or

(2.) Where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; or

32 (3.) Where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption specially set up

or claimed by either party, under such clause of the said Constitution, statute, treaty, or commission."

Here are specified *three* classes of cases in which a writ of error will lie, viz.:

First. Where the validity of a statute or authority of the *United* States is in question.

Second. Where the validity of a statute or authority of *a State is in question as being repugnant to the Constitution or laws of the United States.*

Third. Where the construction of any clause of the *Constitution*, or statute, or commission, of the *United States* is in question.

All these classes of cases are "cases arising under the Constitution and laws of the United States;" for, as we have
33 seen, it is solely from these words in Article III, section 2, of the Constitution, that the power of the Supreme Court to review decrees of the State courts is drawn.

In these three specified classes, therefore, is found, as we have said, the exact definition of the words "*cases arising under the Constitution or laws of the United States.*"

To repeat now what we have already established, we say that if in the present cases, the *first* and *second*, we have cases in which, *first*, the value in controversy exceeds five hundred dollars and *second*, "arises under the Constitution or laws of the United States," then we have cases falling within the cognizance of this court; or, in other words, if here we have cases in which (1) there is a matter in suit of the value of over five hundred dollars, and (2) if the suit is one in which is involved either (*a*) the validity of a statute or authority of the United States, or (*b*) the validity of a statute or authority of a State on the ground that it is repugnant to the Constitution or laws of the United
34 States, or (*c*) the construction of any clause of the Constitution or statutes or commission of the United States, *then this court has jurisdiction.*

Looking, now, into the first and second case, John Stewart *vs.* McGruder, Treasurer, and Joseph Bryan *vs.* the same, we find that the complainant, in each case, in his bill of complaint, after setting forth his grounds of complaint, which are, in brief, that the defendant is illegally and wrongfully threatening and intending to enforce, by levy and distress, payment of a tax for which complainant has already tendered payment in coupons of bonds made receivable for taxes by the laws of Virginia, explicitly alleges that "when the State of Virginia issued the coupons in question, *she entered into a valid contract with whoever might be the holder thereof* to receive the same in payment of taxes, and to be exempt thereafter from any obligation to pay his taxes in any other mediums of payment," and that the act of the General

Assembly of Virginia, approved January 26th, 1882, forbidding collectors to receive coupons in payment of the same, and
35 the act of the General Assembly of Virginia, commanding the collectors to levy for the same, after the tender of coupons, *are repugnant to section* 10 *of article* 1 *of the Constitution of the United States, and are, therefore, void;* and that the said defendant, in proceeding to levy upon your orator's property in obedience to the provisions of said acts, *is depriving your orator of a right guaranteed and secured to him by the Constitution of the United States.*

Here the grounds of the complainant's case are the allegations: 1st, That the defendant threatens to do the wrong under authority of two acts of the General Assembly of Virginia; and, 2d, That said acts are *repugnant to the Constitution of the United States.*

Here, then, certainly is a case in which to quote again the language of the United States statute above cited, "the validity of *a statute* or authority of *a State* is drawn in question *as being repugnant to the Constitution or laws of the United States.*"

36 Here, then, is a case in which this court has *express and unquestionable jurisdiction.*

No case can well be imagined in which the requirements or incidents of jurisdiction—that it should be a case "arising under the Constitution or laws of the United States"—would be clearer.

II. Let us now see if this conclusion is in accordance with the decisions of the courts, and especially of the Supreme Court of the United States.

In Coal Company *vs.* Blatchford, 11 Wall., 172, Judge Field thus states the jurisdiction of the circuit courts of the United States under the old law, or the 11th section of the judiciary act of 1789, thus:

"The 11th section of the judiciary act of 1789 vests in the circuit courts original jurisdiction of suits of a civil nature, at common law or in equity, when the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, in three classes of cases—1st, when the United States are plaintiffs or petitioners; 2d, when an alien is a party; 3d, when the
37 suit is between a citizen of a State where the suit is brought and a citizen of another State."

The first case in which the Supreme Court of the United States had occasion to pass upon the meaning of the words of the act of March 3, 1875, "arising under the Constitution or laws of the United States," was the case of Railroad Company *vs.* Mississippi, 92 U. S., 135, decided in 1880.

In this case a petition for *mandamus* was filed by the State of Mississippi in the State court to compel a railroad company

chartered by the State to remove a stationary bridge over the Pearl river.

The company sought the removal of the case to the United States circuit court on the grounds that the right to use the bridge was vested by the charter in the company, "on a contract with the State of Mississippi; that the State has no power to repudiate that contract or to impair its obligations; that it is a vested right resting on a contract and supported and sustained by the Constitution of the United States," (p. 139.)

The answer of the company also set up the authority of
38 an act of Congress authorizing the building and maintenance of the bridge.

Judge Harlan, in delivering the decision of the Court, says:

"While the case raises questions which may involve the construction of State enactments, and also, perhaps, general principles of law, not necessarily connected with any Federal question, the suit otherwise presents a real and substantial dispute or controversy which depends altogether upon the construction and effect of an act of Congress.

"Is it not plainly a case which, in the sense of the Constitution, *arises* under the laws of the United States?

"If regard be had to the former adjudications of this Court, this question must be answered in the affirmative.

"It is settled law, as established by well-considered decisions of this Court, pronounced upon full argument and after mature deliberation, notably in Cohens *vs.* Virginia, 6 Wheat., 264; Osborn *vs.* Bank of United States, 9 Id., 738; Mayor *vs.* Cooper, 6 Wall., 247; Gold Washing and Water Company *vs.* Keyes, 96 U. S., 199; and Tennessee *vs.* Davis, 100 U. S., 257—
39 1. That while the eleventh amendment of the National Constitution excludes the judicial power of the United States from suits in law and equity commenced or prosecuted against one of the United States by citizens of another State, such power is extended by the Constitution to suits commenced or prosecuted by a State against an individual in which the latter demands nothing from the former, *but only seeks the protection of the Constitution and laws of the United States against the claim or demand of the State.*

"That a case in law and equity *consists of the right of one party* as well as of the other, and may properly be said to *arise under the Constitution or law of the United States* whenever its correct decision *depends on the construction of either.*

"That cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the *right* or *privilege* or *claim* or *protection* or *defence* of the party, *in whole* or *in part*, by whom they they are asserted.

"That it is not sufficient to exclude the judicial power of the

United States from a particular case, that it involves questions which do not at all depend on the Constitution or laws of
40 the United States; but when a question to which the judicial power of the United States is extended by the Constitution *forms an ingredient of the original cause, it is within the power of Congress to give the circuit courts jurisdiction* of that cause, *although other questions of fact or of law may be involved in it.*

"This case decides expressly: 1st, That any cause, or suit, or case 'arises under the Constitution or laws of the United States,' when the *correct decision* of such cause, suit, or case, depends on the construction of *either the Constitution or laws of the United States;* and, 2d, That such a case arises whenever the Constitution or laws of the United States are drawn in question *by the plaintiff or the defendant*—that is, when they constitute the right, or privilege, or claim, or protection, or defense of *either* party, *in whole* or *in part.*"

If only the "Federal question" forms "an ingredient of the original cause," the case is one "arising under the Constitution or laws of the United States."

It certainly cannot be necessary to argue at length that
41 in both the cases now presented to this court, "the correct decision" of the case must depend *on the construction of the Constitution* of the United States *as applied to the acts of the General Assembly of Virginia.*

But the case of Hawes *vs.* Oakland, 104 U. S., 450, still more completely reaches our present cases. In this case the question was of the right of a single share-holder in a corporation to bring his bill against the corporation to restrain or control the action of the corporation.

The court has occasion to refer specially to the case of Dodge *vs.* Woolsey, 18 How., 331, in which a single non-resident stockholder of the bank of Cleveland was allowed to bring his bill in the circuit court of the United States for the district of Ohio against the bank. The Court says that this case was one that peculiarly belonged to the Federal judiciary, and especially to this court to determine, namely, whether the constitution of the State of Ohio violated the obligation of the contract concerning taxation found in the charter of the bank. The court then proceeds to say:

42 "*As the law then stood* there were no means by which the bank, *being a citizen of the same State with Dodge*, the tax collector, could bring into a court of the United States the right which it asserted under the Constitution, to be relieved of the tax in question, except by writ of error to a State court from the Supreme Court of the United States.

That difficulty no longer exists; for by the act of March 3d, 1875, c. 137, (18 Stat. pt. 3, p. 470,) *all suits arising under the Constitution and laws of the United States, may be brought originally in the*

circuit court of the United States, without regard to the citizenship of the parties."

"Under this statute, if it had then existed, *the bank*, in Dodge *vs.* Woolsey, *could undoubtedly have brought suit to restrain the collection of the tax in its own name*, without resort to one of its shareholders for that purpose," (p. 459.)

Here we have an express decision that the act of March 3d, 1875, permits a citizen of a State to bring suit to restrain the collection of a tax levied upon it, on the ground that the levy
43 of the tax is repugnant to the Constitution of the United States, in the circuit court of the United States, in the same State, *without regard to the citizenship of the parties.*

Every element and incident of the present cases of *John Stewart*, and of *Joseph Bryan*, against the tax-collector, is in exact accordance with the case, and it must be held to completely decide these cases.

Reference might also be made, if necessary, to the case of Eaton *vs.* Calhoun, decided by Judge Baxter, in 2 Flipper, 593, which is cited at length in General Swayne's brief now before this court.

But, perhaps, the most recent decision of authority, is that of Mr. Justice Harlan, of the Supreme Court of the United States, in the circuit court for the district of Illinois, reported in the *Chicago Times* of June 15th, 1883.

This was on information in chancery, filed originally in the State court by the Attorney General of Illinois, against the Illinois Central Railroad Company, the City of Chicago, and
44 the United States of America. The information asked for a decree in general, affirming the right of the State to certain lands lying in the bed of Lake Michigan. The defendant railroad company removed the cause to the circuit court of the United States, and a motion was thereupon made to remand the cause to the State court.

In deciding this motion, Judge Harlan says:

"A careful analysis of the pleading shows (1) that the relief to which the State is entitled depends in part upon the construction, operation, and effect of Virginia's act of cession to the United States, and the acts of Congress creating the Territory and admitting the State of Illinois into the Union; (2) that the rights of both parties depend *mainly* upon the inquiry whether *the act of the Illinois Legislature passed in* 1873 *is in violation of those clauses of the Constitution of the United States* to which reference has been made.

It seems to the court entirely clear that, according to the adjudications of the Supreme Court of the United States, *this is a case arising under the Constitution and laws of the United States.*

45 That it presents questions which may be determined *without reference to the Federal Constitution or of the laws of Congress*, or that the Federal questions upon which the case mainly depends are raised *not by the State which instituted the suit, but by the defendant company*, is not material. In Railroad Company *vs.* Mississippi, 102 U. S., 140–1, it was ruled that the judicial power of the United States extends to suits by a State against an individual, in which the latter demands nothing from the former, *but only seeks the protection of the Constitution and laws of the United States against the claim or demand of the State;* that a case in law or equity *consists of the right of one party as well as the other*, and may properly be said to *arise under the Constitution or a law of the United States* whenever its correct decision depends on the construction of either, "and that it is not sufficient to exclude the judicial power of the United States from a particular case that it involves questions which do not at all depend on the Constitution or laws of the United States; but when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original
46 cause, it is within the power of Congress to give the circuit court jurisdiction of the cause, although other questions of fact or of law may be involved in it."

"Did the act of 1869," Judge Harlan continues, "alone, or supplemented by its alleged acceptance on the part of the company, *constitute a contract between the State and the company within the meaning of the contract clause of the Federal Constitution;* if so, did the repealing act of 1873 *impair the obligation of the contract, or does it, within the meaning of the 14th amendment, deprive the company of property rights without due process of law?*

These questions plainly involve a construction of the Federal Constitution, and the rights of the parties so materially depend on their determination that the *court does not doubt that the case is one arising under the Constitution of the United States.*

Here Judge Harlan says that *the question* (1) *whether there was a a contract within the meaning of the Federal Constitution*, and the *question* (2) *whether that contract is impaired by the State repealing act*, involves a construction of the Federal Constitution, and hence they constitute a case "arising under the Constitution of
47 the United States."

In the present cases we have (1) the question whether the acts authorizing the issue of the coupons in question *did or do constitute a contract*—a question already explicitly decided in the affirmative by the Supreme Court in Antoni *vs.* Greenhow—and the question whether the acts of the General Assembly of Virginia, forbidding the receipt of coupons and directing tax collectors to levy after tender of coupons, *do impair the said contract.*

We have here, therefore, the exact questions which are declared by Judge Harlan to "constitute a case" *arising under the*

Constitution of the United States, and hence cognizable in this court.

In Manufacturing Co. *vs.* Vulcanite Co., 13 Blatchford, 388, Mr. Justice Hunt says, after citing the terms of the act of March 3d, 1875:

The jurisdiction of the Federal courts, under the Constitution and laws of the United States, depends upon two points, first, as arising from *the subject matter of the controversy;* and,
48 second, as dependent on *the character of the parties.* The act of 1789 made the jurisdiction of the circuit courts dependent on the character of the parties. The act of 1875 has altered this rule and given to that court jurisdiction in all cases in law and equity arising under the laws and Constitution of the United States.

In Louisiana State Lottery *vs.* Fitzpatrick, 3 Woods, 222, it was held that the act of March 3d, 1875, enlarged the jurisdiction of the circuit courts to the full limits authorized by the Constitution.

That a bill in equity charging that a contract was established by a legislative act of the State, and that this contract was impaired by a subsequent act of the Legislature of the State "disclosed a case arising under the Constitution of the United States, of which the circuit court had jurisdiction, irrespective of the citizenship of the parties."

This case is in all respects, parallel with the present cases.

In Mayor *vs.* Cooper, 6 Wall., 253, Mr. Justice Swayne says:

49 "Nor is it any objection that questions are involved which are not all of a Federal character. If one of the latter exist—if there be a single such ingredient in the mass—it is sufficient. That element is decisive upon the subject of jurisdiction."

Judge Dillon, in his work on "Removal of Causes," lays down this compendious definition:

There must be some question actually involved in the case, depending for its determination upon the correct construction of the Constitution, or some law of Congress, or some treaty of the United States, in order to sustain the Federal jurisdiction under the clause under consideration, namely, "suits arising under the Constitution, laws, or treaties of the United States," s. 31, p. 40.

Other authorities, to the same effect, are:

N. O. Water Works Co. *vs.* St. Tam. Water Works Co., 14 Federal Rep., 194.

Sawyer *vs.* Parish of Concordia, 12 Fed. Rep., 754.

Connor *vs.* Scott, 4 Dillon, 242.

In Sawyer *vs.* Parish of Concordia, 13 Fed. Rep., 754, the precise question of jurisdiction here involved arose.

50 The plaintiff sued the parish for a sum alleged to be due under a contract between plaintiff and the parish, which contract he alleges has been impaired by subsequent acts of the Legislature of Louisiana.

Both parties being citizens of Louisiana, the defendant denied the jurisdiction of the Court. The Court says:

The act of March 3d, 1875, made some radical changes in the practice and jurisdictional powers of the circuit courts. The State courts, of course, have ample power to try this case, or any other suits, involving an interpretation of their statutes or constitution, and before the act of March 3d, 1875, had original jurisdiction over such cases as this, to the exclusion of the Federal courts. That act enables this Court to try concurrently with the State courts all suits of a civil nature involving over five hundred dollars, "arising under the Constitution and laws of the United States." "Now, it is no longer necessary, in order to reach the Federal court, that a suitor setting up any such right or privilege should begin his action in the State courts. Such a right, privilege, or immunity, makes up a Federal question,

51 and if his suit involves such a question he may begin it in this Court."

And the Court held that it had jurisdiction.

In N. O. Water Works Co. *vs.* St. Tam. Water Works Co., a bill was filed to protect complainant's rights by enjoining the defendants from further action in the premises.

The Court here says:

"The case seems so narrow that the counsel have argued but two questions: (1.) Has the Court jurisdiction? (2.) Does the Constitution of the United States protect the complainant against the repeal of its charter?

"The statement of the second question seems to dispense with argument as to the first. No question could more clearly show 'a matter in dispute arising under the Constitution of the United States.' And in such a dispute original jurisdiction is given the circuit courts of the United States by the act of March 3d, 1875."

Attention is specially called to the exact definitions or

52 limitations, laid down in the foregoing cases, to the right to invoke the jurisdiction of this Court.

Under the act of March 3d, 1875, any case which involves a Federal question, or in which such a question "forms an ingredient" "of the original cause," whether it is set up by plaintiff or defendant—whether asserted as a right or defense, or claim or a protection, in whole or in part—is a case "arising under the Constitution of the United States," and is within the jurisdiction

of this court wholly, without reference to the citizenship of the parties.

The jurisdiction of the court under the act of March 3d, 1875, depends on "the subject-matter of the controversy," not on "the character of the parties."

Further, that the jurisdiction is not excluded by the fact that other questions are involved which have no relation to the Federal Constitution or Federal laws, if only a Federal question forms one element of the case which must be decided.

The fourth and fifth cases do not appear to the court to
53 come within the scope of the act of 1875.

As to the fourth case named this is a mere action of trepass for damages, in which no question of a Federal character is raised by the pleadings. The cause must be remanded to the State court from which it was removed. The fifth case is brought under the civil rights act, but does not, in the judgment of the court, under the decisions of the Supreme Court, come within the scope of that act.

Orders will be passed in these respective cases in accordance with this opinion. We have to acknowledge our indebtedness to the counsel who argued these cases for the excellent briefs filed therein, which have served to save us a great deal of labor in considering the construction of the act of 1875.

HUGH L. BOND,
C't Judge.

UNITED STATES OF AMERICA, }
Eastern District of Virginia, } *ss:*

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, hereby certify that the foregoing is a true and complete transcript of the record
54 and proceedings of the cause therein named, as the same appears on file and record in my office.

In testimony whereof I have hereto set my hand and affixed the seal of said court, at Richmond, this 14th day of September, A. D. 1883.

[SEAL.] M. F. PLEASANTS, *Clerk.*

Endorsed on cover: E. Virginia, C. C. U. S. No. 970. A. Austin Smith, plaintiff in error, *vs.* Samuel C. Greenhow. Filed 22d September, 1883.

109-669

OCT 27 1883

Supreme Court

OF THE UNITED STATES.

A. AUSTIN SMITH

vs.

S. C. GREENHOW.

No. 970.

Advanced under Rule 32.

BRIEF

OF WM. L. ROYALL FOR PLAINTIFF IN ERROR.

NEW YORK:
DOUGLAS TAYLOR, LAW PRINTER, 89 NASSAU ST. CORNER FULTON.
1883.

Supreme Court of the United States.

A. A. SMITH
vs.
S. C. GREENHOW.
} *No.* 970.

Brief of Wm. L. Royall for Plaintiff in Error.

Statement of the Case.

The plaintiff in error is a citizen of Richmond, Virginia, who, prior to the institution of this suit, owed taxes to the State of Virginia for the year 1882. The defendant is the Treasurer of the City of Richmond, and is charged by law with the duty of collecting taxes due the State by residents of Richmond City. The laws of the State authorize the defendant to levy for taxes due the State after the first of December of each year; that is, the taxes may be paid voluntarily by the tax-payer at any time between the first day of February in any year, and the first day of December of that year. If they are not paid prior to December 1st, they are liable to be levied for after December 1st.

The plaintiff brought his action in the Circuit Court of the City of Richmond for a trespass. The plaintiff averred in his declaration that the defendant unlawfully came upon his premises and into his place of business and seized and carried

away certain property; that he remained a long time in the plaintiff's place of business, and, during that time, he obstructed the plaintiff and prevented his being able to carry on and conduct his business, and committed other wrongs and injuries upon the plaintiff. The defendant filed a special plea, averring that the plaintiff owed the State taxes which he would not pay; that the defendant is Treasurer of Richmond City and collector of State taxes, and that it is his duty to levy for taxes; that he levied on the plaintiff's property to enforce payment of the tax due, and that that is the supposed trespass complained of.

The plaintiff filed a replication to this plea, in which he averred that prior to the time when the defendant levied he had tendered him coupons in payment of his tax and that he had kept his tender good.

The defendant filed a rejoinder to this replication, which admits the tender, but avers that the act of the General Assembly of January 26, 1882, forbade him to receive the coupons, and another act of the General Assembly commanded him to levy on the plaintiff's property to enforce payment of the tax due.*

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*The coupons tendered in this case were issued under the provisions of the Act of March 28th, 1879, which coupons were held by the Supreme Court of Appeals of Virginia to stand in all respects upon the same footing as those issued under the Act of March 30th, 1871, in Williamson *v.* Massey, 33d Gattan, 237.

The first pleaded Act is as follows:

Chap. 41.—An Act to provide for the more efficient collection of the revenue to support Government, maintain the public schools and to pay interest on the public debt.

Approved January 26, 1882.

1. Be it enacted by the General Assembly of Virginia, that the several tax collectors of this commonwealth shall receive in discharge of the taxes, license taxes and other dues, gold, silver, United States treasury notes, national bank currency, and nothing else; provided that in all cases in which an officer charged by law with the collection of revenue due the State, shall take any steps for the collection of same, claimed to be due from any citizen or tax-payer, such person against whom such step is taken, if he conceives the same to be unjust or illegal, or against any statute, or to be unconstitutional, may pay the same under protest, and under such payment, the officer collecting the same shall pay such revenue

The plaintiff thereupon demurred to this rejoinder and the defendant joined in the demurrer. The plaintiff's demurrer is in the precise form provided by the law of Virginia. (V. C., 1873, Ch. 167, sec. 181, p. 1093.) It is not required by that law that the cause of demurrer shall be stated. The simple demurrer brings up all questions of law. Of course it was intended by the plaintiff by his demurrer to say that the Constitution of the United States forbade the State of Virginia to enact the statutes pleaded. The question, there fore, to be determined, was whether the act forbidding the defendant to receive coupons in payment of the plaintiff's tax and the act commanding him to levy on the defendant's property, were valid and constitutional acts and constituted

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into the State treasury, giving notice at the time of such payment to the Treasurer that the same was paid under protest. The person so paying such revenue may, at any time within thirty days after making such payment, and not longer thereafter, sue the said officer so collecting such revenue in the Court having jurisdiction of the parties and amounts.

If it be determined that the same was wrongfully collected, for any reason going to the merits of the same, then the Court trying the case may certify of record that the same was wrongfully paid and ought to be refunded; and, thereupon, the Auditor of Public Accounts shall issue his proper warrant for the same, which shall be paid in preference to other claims on the treasury, except such as have priority by constitutional requirement.

There shall be no other remedy in any case of the collection of revenue, or the attempt to collect revenues illegally, or the attempt to collect revenue in funds only receivable by said officers under this law, the same being other and different funds than the tax-payer may tender or claim the right to pay, than such as are herein provided; and no writ for the prevention of any revenue claim, or to hinder or delay the collection of the same, shall in anywise issue either injunction, supersedeas, mandamus, prohibition, or any other writ or process whatever; but in all cases, for any reason, any person shall claim that the revenue so collected of him was wrongfully or illegally collected, the remedy for such person shall be as above provided and in no other manner. In all such cases, if the Court certify of record that the officer defendant acted in good faith and diligenlly defended the action, the necessary costs incurred by him shall be taxed to and paid by the State, as in criminal cases. The commonwealth attorney for the county or corporation in which suit is brought shall appear and represent the defense. In every case where judgment is rendered for the defendant, a fee of five dollars shall be taxed in favor of said attorney and against the plaintiff, and whenever the Court shall refuse to certify the good faith and diligence of the officer defending the case, a like fee of five dollars shall be taxed against said officer. Any officer charged

a defense to the defendant for his forcible seizure of the plaintiff's property, and his other trespasses. As this was the question to be determined, the plaintiff claimed that his case arose under the Constitution, and that under the Act of 1875 he had a right to remove it for trial into the United States Circuit Court. He accordingly filed his petition and bond, and the record was certified to the United States Circuit Court. Coming on to be heard in this latter Court the learned Judge, held that the case did not arise under the Constitution and he accordingly remanded it for trial to the State Court.

The action of the Court, in refusing to try the issues involved and remanding the cause, is assigned for error.

Argument.

The precise question to be tried in this case is, Does it arise under the Constitution? If it does, then the Circuit Court ought to have tried it. If it does not, then the Circuit Court was right in remanding it.

The source of the judicial power of the United States is the provision of the Constitution which extends that power to all cases in law and equity, arising under the Constitution, laws

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with the collection of revenue, who shall receive payment thereof in anything other than that hereinbefore provided, shall be deemed guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars in the discretion of the Court; but nothing herein contained shall be construed to subject any officer of the State to any suit, other than as hereinbefore provided, for any refusal on his part to accept in payment of revenue due the State any kind or description of funds, security or paper not authorized by this act.

2. This act shall be in force from and after the first day of December, eighteen hundred and eighty-two.

The other act pleaded is the eighteenth section of the Act of April 1st, 1879 (Acts of 1878–79, p. 318, being Chapter 60 of the Acts of the Special Session of 1879), which simply commands the Treasurer to levy for taxes after December 1st.

The Court will perceive, by reading the 18th section of the last-cited statute, that the treasurer seizes the tax-payer's property upon his own authority simply. He has no warrant for his levy, but enters and takes possession by force of his own will simply.

and treaties of the United States, and to a class of cases in which the character and citizenship of the parties determines the jurisdiction. The judicial power is just exactly this broad, and it is no broader. Now, prior to the Act of 1875, Congress had conferred upon the Circuit Courts only a part of the jurisdiction which it was possible to confer upon them. Until then, with some exceptions, which it is not necessary to note here, their jurisdiction was made dependent entirely upon the citizenship of the parties. But in 1875 it was determined to enlarge their jurisdiction and to give them power to protect all persons in the enjoyment of all rights which were secured to them by the Constitution, laws or treaties of the United States. Consequently, the Act of 1875 extends their jurisdiction to all "suits," arising under the Constitution, &c., thus, by making the act speak in the language of the Constitution itself, conferring upon them all the jurisdiction that it was in the power of Congress to confer upon them. If, then, a suit arises under the Constitution, laws or treaties of the United States, the Circuit Courts have jurisdiction of it, without regard to the citizenship of the parties. If it does not, they have no jurisdiction of it. Again, if we can fix the meaning of the language of the Constitution, "Cases arising under the Constitution," then we shall know exactly what is the jurisdiction of the Circuit Courts, for their jurisdiction extends to all such cases if "suit" and "case" mean the same thing.

I do not pause here to comment upon the fact that the Act of 1875 provides that all "suits" arising under the Constitution may be removed for trial, whilst the Constitution in the clause, granting the judicial power, provides that it shall extend to all "cases" arising under the Constitution. I shall assume for the present, what will abundantly appear in the course of the argument, that the Act means exactly what the Constitution means, and that "suits" arising under the Constitution are "cases" arising under the Constitution, and that "cases" arising under the Constitution are "suits" arising under the Constitution.

Nor am I embarrassed in this case by any argument founded on the suggestion that the Constitutional question is part of of the defendant's case, and not part of the plaintiff's case, and, therefore, as the Constitution is relied on to *defeat* the plaintiff's case, his case cannot be said to *arise* under the Constitution. I shall deal with that proposition before I am through, and I shall show to a demonstration that such a case as much "arises" under the Constitution as a case in which the Constitutional question is a part of the plaintiff's case. But for the present that question may be laid aside. The defendant in the case at bar does not rely upon the Constitution. He relies upon certain statutes enacted by the Legislature of Virginia. The plaintiff, by his demurrer, says that those statutes are prohibited by the Constitution. Therefore it is the plaintiff that relies upon the Constitution. He pleads it just as emphatically as though, instead of saying that he demurred to the defendant's rejoinder, he had said in terms, "I plead the Constitution in reply to your rejoinder."

For the present, therefore, I shall discuss the general question, When can a case or suit be properly said to arise under the Constitution.

A case or suit, I submit, arises under the Constitution, whenever it is necessary to construe the Constitution in that suit or case, before final judgment can be pronounced in it. This is so, whether the Constitutional question appears in the first statement of the plaintiff's case, or whether by the rules of pleading or the practice of the Court it fails to appear in the opening statement and only develops itself at a later stage, or whether it fails altogether to appear in the plaintiff's case and appears in the defendant's case as part of his attempt to defeat the plaintiff's case. In either of the three cases mentioned, and in any other conceivable case, if it be necessary to construe the Constitution before final judgment can be rendered in the case, then the case arises under the Constitution.

There are two characters of rights secured by the Constitution—affirmative and negative rights. There are cases in

which the right itself comes from the Constitution, and there are cases in which the right exists independently of the Constitution but is secured to the individual by the Constitution, through that instrument prohibiting the States to deprive the person of the rights. Thus, a negro was no citizen before the adoption of the Fourteenth Amendment, and under the decision in the Dred Scott case he was incapable of becoming a citizen. The Fourteenth Amendment makes all negroes citizens, so that the negroes' right to citizenship comes from the Constitution. Then, if B is under a contract obligation to A, A has a right to have B perform his contract, and this right is outside of and independent of the Constitution; but since the Constitution forbids a State to impair the obligation of a contract, A's right is secured to him by the Constitution.

Now, if a negro brings a suit in Court, complaining that he is deprived of citizenship, and asking the Court to secure him in the enjoyment of his citizenship, his case arises under the Constitution. So, if A brings his suit in Court complaining that a State has impaired the obligation of his contract, and praying the Court to secure to him the benefits of his contract, his case also arises under the Constitution, and it can make no difference in the latter case whether A sets out all the facts going to constitute his case in his first pleading, as in a bill in equity, or whether, because of the rules of pleading or the course of practice he must allow the Constitutional question to lay dormant until a late stage of the case. If, before final judgment is pronounced, the Court is confronted with the Constitutional question, the case arises under the Constitution.

Now, this is the exact definition of this language which the decisions of this Court have affixed to it. It appears to have come before this Court for construction, first in the case of Cohens *v.* Virginia, 6 Wheat., 264. In that case Chief Justice Marshall, speaking for the Court, said, at page 379:

"A case in law or equity consists of the right of the one party as well as of the other, and may truly be said to arise

under the Constitution or a law of the United States whenever its correct decision depends on the construction of either."

In *Osborne* v. *The Bank*, 9 Wheat, 822, the same great Judge, speaking for the Court, said, a case arises under the Constitution when "the title or right set up by the party may be defeated by one construction of the Constitution of the United States, or sustained by the opposite construction." The language quoted is quoted by the Court as laying the law down correctly in *Gold Washing Co.* v. *Keyes*, 96 U. S., 201. In *Railroad Co.* v. *Mississippi*, 102 U. S., 141, the Court declares: "It is settled law, as established by well considered decisions of this Court, pronounced upon full argument and after mature deliberation * * * that a case in law or equity consists of the right of one party, as well as of the other, and may properly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either.

"That cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right, or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted," and of course the same holds of cases arising under the Constitution.

This, too, is the construction of this language which the settled practice of this Court, from its foundation to this day, has affixed to it. The entire power of this Court to review the judgments of State Courts, when no question of the character of the parties is involved, comes from the clause of the Constitution extending the judicial power to all cases arising under the Constitution, laws or treaties of the United States. If a case arises under the Constitution, laws or treaties of the United States, this Court can review the decision of a State Court. If it does not arise under the Constitution, laws or treaties of the United States, it cannot review the decision of a State Court, when no question relating to the parties is involved (of course I leave out of consideration questions of

admiralty and cases involving titles to lands under grants of different States).

Now, this Court has never failed to review the judgment of a State Court where it decided against a right claimed under the Constitution, treatise or laws of the United States; in other words, where a construction of either was necessary to final judgment in the case, and that, whether the Constitutional question appeared in the first statement of the plaintiff's case, or whether it only appeared at a later stage, or whether it was set up by the defendant to defeat the plaintiff's case. Many instances might be cited, but two will suffice. In Keith *v.* Clark, 7 Otto, 454, the plaintiff's case did not disclose the Constitutional question until instructions to the jury came to be given. Yet, as the Court instructed against the claim which the plaintiff made under the Constitution, this Court held that there could be no question of its jurisdiction to review the judgment. In Railroad Company *v.* Mississippi, 102 U. S. R., 135, there was no Constitutional question involved in the plaintiff's case, but the defendant set up an Act of Congress, by way of plea, to defeat the plaintiff's case, and the State Court decided against the plea. This Court took jurisdiction and reversed the judgment of the State Court. So, in every case that has ever come here in which a State Court has decided against a right claimed under the Constitution, in other words, has construed the Constitution, and given judgment against the party pleading it, this Court has taken jurisdiction and reviewed the decision.

This is the construction which the framers of the Constitution put upon this language. When the men who had framed the Constitution came to frame the judiciary act of 1789, they put their construction on this language in the clause defining the jurisdiction of this Court to review the judgments of State Courts. They provided that whenever the validity of a State statute, or of an authority exercised under a State, was called in question on the ground of their being repugnant to the Constitution, or whenever any right, title,

or immunity was claimed under the Constitution, this Court should have power to review the decision of the State Court.

Now, I undertake to say that every case which could possibly involve a construction of the Constitution is provided for here.

It is not possible to conceive of a case calling for a construction of the Constitution which would not fall under one of the heads, "right, title, privilege or immunity." So that to say that this Court should have power to review the judgment of a State Court whenever a right, title, privilege or immunity was claimed under the Constitution was the same thing as to say that it should have jurisdiction in all cases which required a construction of the Constitution before final judgment could be given; and to say this was to say that this was the meaning of the language "Cases arising under the Constitution," for Congress could not give this Court jurisdiction of any but cases that arose under the Constitution, &c.

It is true that in framing the judiciary act they gave this Court power to review the judgments of State Courts only where the decision of the State Court was *against* the right claimed under the Constitution. I cannot think, however, that this was done because any doubt existed as to the power of Congress to allow an appeal from a State Court when the decision was *in favor of* the right claimed under the Constitution, to the party against whom the decision was made. If one man claims a right under the Constitution and the right of his adversary depends upon his being able to make it clear that the first one has not his asserted right under the Constitution, the latter's case as much arises under the Constitution as the former's, because if the construction which the former contends for prevails, the latter will be deprived of his asserted right. Therefore, it is clear that Congress could have given an appeal to a State where her own Court decided against her, as well as it could give it to the citizen where the State Court decided against his claim and in favor of the State. The appeal was not given to the State for

reasons of policy. It was thought that if a State's own highest Court decided that the Constitution forbade her to enact a particular statute, her want of power to enact it must be so clear that there could be no use in cumbering the docket of this Court with an appeal from the decision.

I conclude, therefore, with the original proposition, that it is clear a case arises under the Constitution whenever it is necessary to construe the Constitution before final judgment can be pronounced in the case, no matter at what stage of the contest the Constitutional question appears, and no matter which side, plaintiff or defendant, raises it.

Does a case any the less arise under the Constitution because, though a Federal question must be decided before final judgment is given in the case, yet that Federal question does not appear in the first statement of the case? As in the case at bar, for instance, where the plaintiff's declaration gives no hint of the Federal question, and that does not appear in the case until the plaintiff demurs to the defendant's rejoinder.

If the proposition for which I have been contending is sound, that case as unquestionably arises under the Constitution as any other, for it is necessary to construe the constitution in order to give judgment on the plaintiff's demurrer.

If the settled practice of this Court is correct, it as unquestionably arises under the Constitution as any other case could, for it has been always the practice of this Court to review the judgment of a State Court in such a case, where the decision of the State Court is against the right claimed under the Constitution, and it could not review it unless the case arose under the Constitution. Suppose, for instance, that the plaintiff in the case at bar had not removed it into the Circuit Court of the United States, but had left it for judgment in the State Court, and suppose the State Court had overruled the plaintiff's demurrer to the defendant's rejoinder and put the plaintiff out of court by final judgment against him. Would not this Court have had jurisdiction to review this decision of the State Court? Unquestionably it would, yet it could not review it unless the case arose under the Constitution, for its entire

power to review such a judgment depends upon the case arising under the Constitution. Which shows to demonstration that a case arises under the constitution if it be necessary to construe the Constitution before final judgment is given in the case, although the Constitutional question does not reveal itself until a late stage in the case.

I submit that so soon as the plaintiff filed his declaration in this case, he might have filed his petition for removal, setting out in the petition what the controversy was really about and showing that the defendant proposed to rely upon unconstitutional statutes for his defense, and that the case could have been immediately removed. The defendant could have gone into the Circuit Court of the United States and denied on record that he intended to make any such defense, whereupon the Court would have remanded the cause.

The following considerations prove that this must be so. Suppose that Smith, instead of waiting for Greenhow to levy, had filed his bill praying for an injunction, and in that bill, as he well might have done, he had set out all the facts of the case, showing that Greenhow was about to do him an injury under color of unconstitutional State statutes. In that case, the arising of the case under the Constitution would have appeared on the face of the plaintiff's bill and he could undoubtedly have at once removed it into the Circuit Court.

Now is his right to be less because he happens to be in a common law forum?

Is his right to be less because in a common law court the rules of pleading do not permit him to so state his case as to make the Constitutional question appear in his declaration, but compel him to await its development at a later stage of the case? To say so would be sacrificing substance to form.

Since the case of Hawes *v.* Oakland, 104 A. L. R., 450, I do not see how there can be a doubt about this, and I ask permission to state that case in detail, with the occasion that gave rise to it.

The case of Dodge *v.* Woolsey, 18 How., 331, was this: The Legislature of Ohio chartered a bank, and in its charter

exempted it from all taxation, except a taxation specified in the charter. The bank organized under its charter and commenced business. Subsequently, the State having grown tired of its bargain, passed an act imposing an additional and very burdensome tax upon the bank, and the State's collectors were about to seize the bank's effects to sell for the tax. The bank had a stockholder, who was a citizen of Connecticut. This stockholder demanded of the bank that it should resist payment of the additional tax upon the ground that the law imposing it impaired the obligation of the State's contract with the bank. The directors refused to make resistance, and therefore this stockholder filed his bill in the Circuit Court of the United States for the district of Ohio, against the bank itself and the State's collector of taxes, praying the Court to enjoin and restrain the collector from collecting this additional tax. The great controversey in the case was whether a stockholder could file such a bill, it being insisted that the refusal of the directors to resist payment of the tax was collusive for the purpose of giving the stockholder ground for bringing a suit, in order that he, being a citizen of another State, might bring the suit in the United States Circuit Court. That the real controversy was one between the bank, a citizen of Ohio, and the collector, another citizen of Ohio, which controversy the Circuit Court of the United States had no jurisdiction of, and that the bank's refusal to resist payment of the tax was a mere ruse to give this foreign stockholder a colorable right to institute his suit, so that he might take the controversy away from the State Courts, where it really belonged, to the United States Court. The Supreme Court of the United States held, however, that the stockholder could maintain his suit in the United States Court—that the act imposing the additional tax impaired the obligation of the contract, and that the State's officer must be enjoined from collecting it. This case, in so far as it affirmed the right of a stockholder to bring such a suit, has caused great dissatisfaction in the profession ever since it was decided, upon the

ground that it enables a single stockholder to thrust himself forward and force all his fellow stockholders to assert claims that the great majority may think it prudent and wise to leave unasserted, and because it enables parties to force cases into the United States Circuit Courts that did not properly belong there.

The subject came up before the Supreme Court for review in 1881, in the case of Hawes *v.* Oakland, 104 U. S. R., 450, and the Court there established a rule placing single stockholders attempting to assert such claims upon such terms as greatly modifies the evils that have grown out of Dodge *v.* Woolsey.

In discussing Dodge *v.* Woolsey, the Court say, in Hawes *v.* Oakland, at page 259, by Mr. Justice Miller, "As the law then stood, there was no means by which the bank, being a citizen of the same State with Dodge, the tax collector, could bring into a Court of the United States the right which it asserted under the Constitution, to be relieved of the tax in question, except by writ of error to a State Court from the Supreme Court of the United States.

"That difficulty no longer exists, for by the act of March 3, 1875, Ch. 137 (18 Stat., Pt. 3, p. 470), all suits arising under the Constitution or laws of the United States may be brought originally in the Circuit Courts of the United States without regard to the citizenship of the parties.

"*Under this statute, if it had then existed, the bank, in Dodge* v. *Woolsey, could undoubtedly have brought suit to restrain the collection of the tax in its own name, without resort to one of its shareholders for that purpose.*"

It is perfectly clear, therefore, that this case was one which the plaintiff had a right to remove, and that the Court erred in remanding it.

I will now briefly submit a few remarks upon the proposition that a case cannot be said to arise under the Constitution when the Constitutional question is brought into the case by the defendant. This proposition is distinctly pronounced against by this Court in Railroad Company *v.* Mississippi, 102 U. S. R. ; but a dissenting opinion was delivered in that

case by Mr. Justice Miller, to the argument of which opinion I ask leave to attempt a reply.

The argument is this: A suit is the plaintiff's case, and in order that a suit may be removed, it must arise under the Constitution. If the Constitution do not enter into the plaintiff's case, but is set up by the defendant to defeat the plaintiff's case, it cannot be said that the plaintiff's case arises under the Constitution. In the particular case before the Court the plaintiff had not relied upon the Constitution or any Act of Congress; but the defendant, to defeat the plaintiff, had relied upon an Act of Congress, and Mr. Justice Miller held that as he had brought the Act of Congress into the case to defeat the plaintiff, it could not be said that the plaintiff's case arose under the Act of Congress.

Now, I reply, that if there had been no attempt to remove that case, but it had gone on to judgment in the State Court, and that Court had decided against the right which the defendant claimed under the Act of Congress, the defendant could have appealed from the decision of the State Court to the Supreme Court of the United States, and Mr. Justice Miller admits this in his opinion, and, indeed, no one would think of denying it. But if the defendant could have appealed to the Supreme Court, upon what ground could he have so appealed? The Supreme Court has jurisdiction under the Constitution only of cases which arise under the Constitution, laws or treaties of the United States. In order, therefore, for a case to go to the Supreme Court, it must be one arising under the Constitution, laws or treaties of the United States. The fact, therefore, that the case could have gone by appeal from the State Court to the Supreme Court proves that although the Act of Congress was brought into the case to defeat the plaintiff's case, it nevertheless arose under the Act of Congress; which again proves the original proposition that every case arises under the Constitution if it be necessary to construe the Constitution in order to give final judgment in the case.

DOES THE ACT OF JANUARY 26TH FORBID A TAX-PAYER TO SUE AN OFFICER FOR TRESPASS WHO LEVIES ON HIS PROPERTY AFTER A TENDER OF COUPONS?

This action was commenced in a State Court. Whether the act of January 26th was intended to forbid such an action may be a question. If it was, then it has raised a very serious question. I do not think it can be held to have been intended to forbid such suits. This act provides a proceeding for a tax-payer who pays his tax in gold, silver, United States Treasury notes or National Bank notes, recovering his money back if it was improperly collected from him. This is the only case it makes provision for. Now, if a coupon is a legal tender for the tax (and I think it susceptible of demonstration that it is, and, further on, I shall make that demonstration), then it must follow that the collector can have no right to seize the tax-payer's property after tender of a coupon if the tender be kept good. And if it was intended by this act to say that a citizen of the United States, who has made a legal tender for his tax which is refused, shall have no redress at the hands of a marauding officer who comes upon his premises and seizes his horse with no better right to seize it than the highwayman has, a very serious question has been raised. The tax-payer may defend his premises and property against such a marauder with a double-barrelled shot-gun, and if the State of Virginia can close the doors of the Courts to him he will be compelled to defend his property as he best may. If this act is to produce this state of affairs, then the Constitutional grounds upon which it rests deserve a close inspection.

Whatever may have been in the minds of those who enacted this statute, I do not believe that on a fair construction of its terms it can be held to have been intended to forbid a tax-payer, who tenders his coupons for his tax, to sue an officer for his trespass in seizing his property after the tender, as I will now attempt to show.

I think this act is the most obscure piece of statute law that I ever attempted to construe. Its author ought to have all

the prizes ever offered for confused writing. However, a critical examination of it may enable us to determine some things of it with certainty.

In the first place let me remark, that if it forbids a tax-payer to sue a collector for trespass in levying after a tender of coupons, it creates a condition of things in which a man may suffer a grievous injury and yet be forbidden by the law to have any redress whatever. For the remedy which it provides is not redress for a tax-payer who, having tendered coupons that are refused, stands upon his tender and defies the collector and has his property levied on. The remedy provided by it has reference exclusively to the case of a tax-payer who, having tendered coupons that are refused, chooses to pay money and then sue to get it back. That is the only remedy provided by it, to wit: for the case of a tax-payer who waives his right to stand on his tender and pays his tax in money. If it intends to forbid the tax-payer who stands on his tender, to sue for the trespass of a levy, then it intends to prohibit him from having any redress whatever for an admitted injury. The language of an act should be plain and unmistakable in its terms, before the Court holds that it has any such effect. Is this the effect of the Act of January 26th? I submit that it is not.

The first provision of the Act is simply that the collectors of taxes shall receive in payment of them gold, silver, &c., and nothing else. Then follows a proviso that whenever a collector shall take steps for the collection of a tax, the tax-payer may, if he choose, pay the same in money, under protest, and he may, within thirty days, if he choose, sue the collector to recover it back. Now, this has reference solely to the case of a man who chooses to abandon his right to stand on his tender—who gives up the contest and pays the tax in gold or silver, &c. It has no reference to the case of him who defies the collector.

The next provision is that there shall be no other remedy in "any case of the collection of revenue, or the attempt to collect revenue illegally." What is a remedy in a "case of

the collection of revenue?" For the officer to undertake to collect from an unwilling tax-payer by legal proceedings, would be a "case of the collection of revenue." Does this mean to say that the officer shall be confined to the proceedings described, to collect the revenue? The act expressly provides that taxes may be paid in gold, silver, &c. Now, if a tax-payer has tendered gold, and the officer arbitrarily refuses to receive it, and arbitrarily and maliciously insists on levying on the tax-payer's property, this would be a "case of the collection of revenue." But does this act intend to say that in that case the tax-payer should have no right to sue the officer for a trespass? It is impossible that this could have been intended.

The remedy referred to is a remedy for him who voluntarily pays his tax. When the act says there shall be no other remedy in any case of the collection of revenue, these words, "case of the collection of revenue," receive a definition. It is intended to say that there shall be no other remedy for him who voluntarily pays his tax in money to get that money back. This construction is confirmed by the last clause of the sentence, which is "but in all cases, for any reason any person shall claim that the revenue so collected of him was wrongfully or illegally collected, the remedy for such person shall be as above provided, and in no other manner." This shows that the subject-matter that had been dealt with was the case of one who had paid, and was seeking to get his money back. Nor is this view affected by the provision that there shall be "no writ for the prevention of any revenue claim, &c."

I suppose this means that there shall be no writ to prevent an officer from collecting the revenue. But to sue an officer for a trespass in having levied when he had no right to levy, could not possibly be held to be a "writ for the prevention of any revenue claim."

The only other substantive provision is the last, that "*Nothing herein contained* shall be construed to subject any officer of the State to any suit, other than as hereinbefore pro-

vided, for any refusal on his part to accept in payment of revenue due the State any kind or description of funds, security or paper not authorized by this act."

Now, for a tax-payer to sue a collector for a trespass in levying after a tender of coupons is not an attempt to make him liable through or by force of any provision of this act. Nor is it an attempt to make him liable for his refusal to accept the coupons in payment of the tax. It is undoubtedly an injury and a wrong to the tax-payer for the officer to refuse to receive his coupons in payment of the tax, but the tax-payer chooses to waive this wrong. The injury for which he sues him is the other and greater injury of levying on his property when he has no right to levy.

I submit, therefore, that this act does not forbid a tax-payer to sue a collector for a trespass in levying after a tender of coupons.

THE STATE OF VIRGINIA IS WITHOUT POWER TO FORBID HER CITIZENS TO ASSERT THEIR GRIEVANCES IN THE COURTS.

But if it was intended to have that effect, I submit that it would not be within the power of the Legislature to do this. To say that the only proceedings which shall be had in Court in any case in which coupons are involved shall be the proceedings provided for in this act, is to say that he who elects to stand on his right to tender coupons shall be wholly without redress whenever a marauding officer of the State chooses to maltreat him in his person or property. It is to put a man to whom the Constitution of the United States has guaranteed the right to be exempt from molestation after he has made a tender of the State's coupons, outside the pale of the law, and to deny him the right to seek the protection of the Courts to secure to himself that immunity which the Constitution has guaranteed to him. For, a proceeding for recovering back money which the tax-payer has paid, is no redress for a man who refuses altogether to pay money and stands upon his

undoubted right to pay his tax with a coupon. It is to say that although he has this right, nevertheless he, out of all the population, shall have no right to the protection of the law; that the possession of his right converts him into an outlaw.

Is it within the power of the State of Virginia to do this? I submit that it is not.

This subject is fully treated by Judge Cooley in his book on Constitutional Limitations, p. 448, *et seq.*, and notes, 4th edition. At page 449 he says: "Every man is entitled to a certain remedy in the law, for all wrongs against his person or his property, and cannot be compelled to buy justice or to submit to conditions not imposed upon his fellows as a means of obtaining it." See also *Ib.* 458-59.

The Constitution of the United States, begins with this declaration: "We the people of the United States, in order to form a more perfect Union, *establish justice*, ensure domestic tranquility, &c., do ordain and establish this Constitution of the United States." Since the Constitution was ordained to establish justice, it follows that the States are forbidden by it to deny justice. I submit that a State statute which provided in substance that "He may take who has the power, and he may keep who can," would be forbidden by the Constitution of the United States as a denial of justice. If the act of January 26th was intended to forbid a tax-payer to sue a collector for his trespass in levying after a tender of coupons, what is it but to say that "he may take who has the power, and he may keep who can?"

In the case of Loan Association *v.* Topeka, 20 Wall., 655, this Court declared a State law, which taxed one man for the benefit of another man, void as being against common right. In the course of the opinion, it said, at page 663:

"The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined power. There are limitations on such power which grow out of the essential

nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No Court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other should be so no longer, but A should thereafter be husband of C, and B the wife of D; or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B." The same principle is reaffirmed in Parkersburgh *v.* Brown, 106 U. S., 500. Is it any more a violation of the fundamental rights of the citizen to declare that his homestead shall henceforth be the property of another, than to prohibit him from going into the Courts to repossess himself of property which has been violently and unlawfully taken from him? or to prohibit him from going into Court to require compensation for an injury which another has wantonly inflicted upon his person or property?

It may be argued that it is within the power of the people of Virginia to assemble in convention and abolish all Courts of justice, and that there can be no right to a form of action if there is no right to a forum in which to conduct it.

To this I answer that the people of Virginia have not abolished all Courts. On the contrary, the Constitution of the State provides, Art. 6, sec. 1, that "there shall be a Supreme Court of Appeals, Circuit Courts and County Courts," and so long as there are Courts in the State any law which forbade a citizen to resort to them to have his injuries redressed would be void as against common right and as a denial of justice.

If the people of the State should attempt to abolish Courts there, then I say that since they have a republican form of government, and since the Constitution of the United States forbids them to have any other form, their act would be vain and impotent. They cannot abolish the existing Courts of justice without creating others in their stead. The essential difference between the idea of a republic and the idea of a

despotism is that one is a government of laws, the other is a government in which the will of the despot takes the place of law and is supreme. In a republic every man KNOWS his rights because his rights are fixed by law. In a despotism no man knows his rights, because his rights depend upon the will of the despot. He has no rights, because he and his possessions belong to his master. Now, a tribunal in which the citizen may invoke the protection of the law for his person and property, is absolutely essential to the existence of law. There can be no law which binds if there be no power to declare the law and to execute it when declared. Alexander is autocrat of all the Russias and his will is supreme therein. There need be no Courts of justice in Russia, because there is no justice there (I speak of justice in the sense of fixed rights), and a military officer, with a platoon of soldiers, can execute the will of the despot as conveniently as a sheriff armed with a writ. But this is not true of a country where rights are fixed by law. There must be a forum to declare what the law is, and to put that law in force when it is declared. So that Courts are just as essential to the idea of a republic as the existence of supreme and arbitrary power in any functionary is opposed to it. If the State of Virginia should abolish Courts of justice, she would have converted her government from a republic into a despotism, her acts would be vain and impotent, and Congress would at once restore a republican form of government to her citizens, in which law would prevail and Courts would administer it.

THE FOURTEENTH AMENDMENT FORBIDS THE STATE OF VIRGINIA TO ENACT SUCH A STATUTE.

The Fourteenth Amendment to the Constitution forbids a State to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

In the Slaughter House cases, 16 Wall., 37, it is definitely determined that the only privileges and immunities secured

to the citizen by this amendment are those privileges and immunities which he has in virtue of his national citizenship, and at page 79 the Court mentions some of the fundamental rights of a citizen which are undoubtedly privileges and immunities attaching to the citizen in virtue of his national citizenship. Amongst others, the right to go to the seat of Government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions, are privileges and immunities of the citizen of the United States. He has the right of free access to its seaports, to the sub-treasuries, land offices *and Courts of justice in the several States.*

These are named, in the Slaughter House cases, as undoubtedly privileges and immunities that attach to the citizen as a citizen of the United States.

Now, I submit that there is no right of the citizen more clearly a right pertaining to his national citizenship than his right to resort to the Courts of justice for protection in a right which the Constitution confers upon him. I submit that it is the fundamental privilege of the national citizen—a privilege upon which all his other national privileges rest—to resort to the Courts to seek protection in the enjoyment of those rights which the national Constitution has conferred upon him. And for a State to attempt by her laws to forbid the citizen of the United States to resort to the Courts for protection in his Constitutional rights would be for that State to attempt to abridge his privileges as a citizen of the United States.

Therefore, if the State of Virginia attempted, by the act of January 26th, 1882, to withdraw from the citizen of the United States the right to sue her collector for his trespass in seizing that citizen's property after a tender of coupons, she attempted to abridge that citizen's privileges and immunities, and her act is void.

The Fourteenth Amendment forbids any State to deprive any person of life, liberty or property without due process of law. So far as this prohibition concerns property, I suppose there can be no doubt that it is a prohibition against the confisca-

tion of a person's property. It is equivalent to declaring that no person shall be deprived of his property without a just compensation being made to him. Yet, if the Act of January 26th is intended to forbid him who stands upon his tender suing the officer who seizes his property, then the act which commands the officer to seize the property, notwithstanding the tender, is an act confiscating the tax-payer's property. It is an act depriving the tax-payer of his property without any equivalent therefor whatever.

So, also, if it forbids him who stands upon his tender to sue the officer after his levy, it deprives that person of the equal protection of the laws. Observe, the act only forbids those persons to sue for a trespass who have tendered coupons for taxes. All other persons are left the same freedom to sue for trespasses committed against them, as they had before the passage of the act. Only persons who have tendered coupons for taxes are forbidden to seek redress for trespasses committed upon them. Now, then, these people are denied that protection of the laws which all other persons receive. This is expressly forbidden by the Fourteenth Amendment.

I am now brought to a discussion of the question: What is the effect of a tender of coupons for taxes?

THE COUPON IS A LEGAL TENDER FOR THE TAX.

I submit that the coupon is a legal tender for the tax.

The Act of Assembly, which authorized their issue, provides that they shall be a good tender for taxes. Therefore, the State has made an unequivocal contract that they shall be legal tender for taxes.

When the character of the coupons first came before the Supreme Court of Appeals of the State of Virginia, it decided that they were good legal tender for taxes.

Antoni *v.* Wright, 22 Gratt., 933.

The authority of this case was recognized in

Wise *v.* Rogers, 24 Gratt., 169.

The same proposition was reaffirmed in
Clarke *v.* Tyler, 30 Gratt., 137.

And in
Williamson *v.* Massey, 33 Gratt., 237.

This Court held the same thing in
Hartman *v.* Greenhow, 102 U. S., 672.

In the last named case this Court says, at page 679:

"A contract was thus consummated between the State and the holders of the new bonds and the holders of the coupons, from the obligation of which she could not, without their consent, release herself by any subsequent legislation. She thus bound herself not only to pay the bonds when they became due, but to receive the interest coupons from the bearer at and after their maturity, to their full amount, for any taxes or dues by him to the State."

In Antoni *v.* Greenhow, October Term, 1882, this Court said, through Mr. Chief Justice Waite:

"*The right of the coupon holder is to have his coupon received for taxes when offered.*"

"ANY ACT of the State which forbids the receipt of these coupons for taxes is a violation of the contract and void as against coupon holders."

Mr. Justice Mathews laid down the same proposition in his separate opinion. He said:

"I agree that the State of Virginia, by the Act of 1871, entered into a valid contract with the holders of its bonds to receive their coupons in payment of taxes; *and that any subsequent statute which denies this right is a breach of its contract and a violation of the Constitution of the United States.*"

Therefore, by the language of the State's contract, by the four decisions of her own Supreme Court, by the two decisions

of this Court, and by the opinion of each and every Justice of this court, the coupon is a legal tender for the tax.

Second.

There is nothing in the opinion of the Court in Antoni *vs.* Greenhow which is in conflict with this proposition, however much certain expressions may seem to be in conflict with it. Take, for instance, what is said of the right of the State to require prepayment of the tax in money. It was there held that she might require prepayment in money *as a condition precedent to the tax-payer compelling the officer by mandamus to receive the coupon.*

But it was not said that she could require prepayment in money as a condition precedent to the tender of the coupon being a valid and legal tender for the debt. It is one thing for a man to make a valid and legal tender for the debt that he owes, but quite another thing for him to seek to make his creditor receive what he tenders. If A owes B one hundred dollars, and on the day when it is due he offer B one hundred gold dollars, which B refuses to receive, B will not be allowed after that to molest A in respect to his claim. But if A should go to a Court and ask for a mandamus to compel B to receive the money he would be laughed at.

I understand the decision in *Antoni* vs. *Greenhow* to mean that it is no part of the tax-payer's duty to PAY his tax. His duty is to OFFER to pay it, and if the State chooses to refuse his offer, she may do so—she may lie out of her revenue if she chooses; but that the tax-payer has done his full and entire duty when he makes the offer. Now, as he is under no obligation to *pay* his tax, but only to *offer* to pay it, if he take upon himself the supererogatory task of compelling the State's officers to receive his coupons in payment of his tax, it is no hardship on him that he should be required to proceed about his uncalled-for task in the State's method rather than in his own. Therefore the Court held that the State might

require prepayment in money as a condition to his driving his coupon into the treasury by mandamus; but not as a condition to its being a valid and sufficient tender.

In discussing the validity of the provision of the act that required prepay ment of the tax in money, the Chief Justice gives as a reason why the State might do this, that promptness in the payment of the revenue, and genuine money in her treasury, are essential to the life of the State. However potent this consideration might be for demonstrating that the State of Virginia ought never to have made this contract, it does not advance one step towards proving that she did not make it, and that the coupons are not, therefore, legal tender. We must, therefore, suppose that he meant to apply this remark to the case that was actually before him, and to limit its influence to that case. We must suppose that he meant to say that this would justify the State, if nothing else would, in imposing this condition on those who sought to make her officers actually receive the coupons into the treasury, and not that it was a consideration of such cogency as to justify the State in passing a law that would deprive the coupons of their legal tender character.

The argument involved in the proposition that the necessity the State is under to have genuine money in her treasury, would justify her in enacting a statute depriving the coupons of their legal tender character, and subjecting them to judicial scrutiny before they are to be received, deserves a more critical examination. It amounts to this, that where strong reasons exist why a State ought not to be bound by her contract she will be allowed to release herself from it by her own act alone, which is the same thing as to say that the Constitution does not bind her. But the argument proves too much. If it is strong enough to justify the State in ordering her officers to refuse coupons, until they have been subjected to a judicial examination, it will equally justify her in ordering them to refuse greenbacks until their genuiness has been established by judicial decision.

The reason supposed is the necessity the State is under for

having genuine money in her treasury. But there are counterfeit greenbacks, and it is just as easy to counterfeit a greenback as it is to counterfeit a coupon. The State can no more utilize a counterfeit greenback that may be in her treasury than she can utilize a counterfeit coupon.

Therefore, if her necessity for having genuine money in her treasury would justify her in prohibiting her officers to receive her coupons until their genuineness was established by judicial decision, the same necessity would equaly justify her in forbidding them to receive greenbacks until their genuineness was established by judicial decision.

Now the supreme legislative power of this land has declared the greenback to be a legal tender for all debt. It has declared that whenever a man owes a dollar, a tender of one of the promises of the United States Government to pay a dollar shall be a legal tender for that obligation. After a man has made a legal tender for what he owes, which is refused, it is the same thing to him as if it was paid. Whatever loss or damage ensues falls upon his creditor and he bears no part of it, and if the creditor pursues him further he does so at his own peril.

Can it be said that the necessity the State is under to have genuine money in her treasury will justify her in forbidding her officers to receive genuine greenbacks in payment of her taxes, because it is possible that her officers may have spurious greenbacks imposed upon them? If A tenders what is truly a genuine greenback in payment of his taxes, and the officer refuses it and then levies on A's goods, is it possible that any State laws can shield this officer and exonerate him from his obligation to answer to A for his trespass?

And the argument may be carried still further. If the State's necessity will justify her in forbidding her officers to receive coupons and greenbacks, it will equally justify her in forbidding them to receive gold and silver, for there are counterfeit and spurious coins of both sorts. Can it be that when a man has tendered what is really the Government's gold coin, any power whatever can, for any reason, put him

in default in respect to that debt. To state the proposition is to refute it.

Apart from the State's inhibition against impairing the obligation of her contract in the case of her coupon, and of the inhibition against her arresting the currency of the Government's money—in the case of the greenback and coin—the vice of the argument lies in supposing that there is any such thing as an unquestionable medium of payment. There is no such thing. In the history of the world there has never been any money used yet that could not be and was not counterfeited, and in the nature of things there can be none such. The State, therefore, like any individual, must take her chances when she orders her officers to refuse coupons, greenbacks or coin. If it turns out that the coupon, greenback or coin that was refused was spurious coupon, greenback or coin, then no harm has happened to any one. But if turns out that the coupon, greenback or coin was really and in point of fact genuine coupon, greenback or coin, then the person tendering will have been in the right from the moment of his tender, and the person refusing it will have been in the wrong from the same moment, any State law to the contrary notwithstanding.

The truth is, supposing there were no question involved of the State being prohibited to impair the obligation of her contract, the method of forbidding her officers to receive all coupons until their genuineness was established by the verdict of a jury would not be the appropriate method for protecting herself against counterfeit coupons. To distinguish between a counterfeit coupon and a genuine coupon is, if the counterfeit is well executed, a task which requires the most delicate technical skill. Jurors certainly do not possess it, and it is not to be supposed that many Judges possess it. Therefore the verdict of a jury finding a coupon to be genuine, or the opinion of a Judge that a coupon is genuine, furnishes the State a very slight guarantee after all that she is not redeeming a spurious coupon. One really expert clerk who is thoroughly versed in the handling of paper money is worth all the juries of the State put together. The one KNOWS a counter-

feit the instant he touches it or his eye falls upon it, the others are as apt to pass a counterfeit for genuine as they are to pass one that is really genuine.

The State's real security is to have a really expert accountant at the counter of her treasury to examine every coupon that the collectors bring in, to receive from them those that are genuine and to reject those that are counterfeit. The State loses nothing if her collectors receive counterfeit coupons from the tax-payers. She is not bound to receive them from the collectors, and they, their bondsmen, and the tax-payers all remain bound to her for her tax. The tax-payer has not paid his tax when he fools the collector into taking from him a counterfeit coupon. Therefore when the collector brings to the treasury a coupon which is counterfeit, the State may go upon him and his bondsmen for what is due to her, or she may send the collector back after the tax-payer who imposed the spurious coupon upon him. It matters not how many counterfeit coupons are in circulation, still, she cannot possibly lose by them if she will only have an expert at her treasury to examine those which the collectors bring in.

Therefore, it is clear that all the Chief Justice intended by what he said on this topic is that the necessity the State is under to have revenue justifies her in requiring prepayment of the tax as a condition precedent to the tax-payer having the writ of mandamus, but not as a condition precedent to the coupon retaining its legal tender character.

Again, the Chief Justice says:

"It is no doubt true that the commercial value of the bonds and coupons has been impaired by the hostile legislation of the State, but this impairment, in our opinion, comes, not from the change of the remedies, but from the refusal to accept the coupons without suit."

Here is a distinct statement that the part of the law which prohibited the officer to receive the coupon—that part of it which undertook to deprive it of its legal tender quality—was what caused the depreciation in the commercial value of the bonds and coupons. Now, it is the settled doctrine of this

Court, that if a law causes a diminution in the commercial value of a security, that proves it to be a law impairing the obligation of a contract.

Planter's Bank *v.* Sharp, 6 How., 327.
Von Hoffman *v.* Quincy, 4 Wall., 553.
Edwards *v.* Rearzey, 96 U. S. R., 601.

The Chief Justice could not possibly, therefore, have intended to say that the part of the act which forbade the officers to receive the coupons was what caused their decline in value, but that the State might nevertheless enact that part of it.

Finally, the Chief Justice twice declares most emphatically that the Court did not intend to sanction the part of the law which undertook to deprive the coupon of its legal tender character.

He says:

"The question we are now to consider is not whether, if the coupon tendered is in fact genuine and such as ought, under the contract, to be received. and the tender is kept good, the Treasurer can proceed to collect the tax by distraint or such other process as the law allows, without making himself personally responsible for any trespass he may commit, but whether the Act of 1882 violates any implied obligation of the State in respect to the remedies that may be employed for the enforcement of its contract if the collector refuses to take them."

And again:

"In conclusion, we repeat that the question presented by this record is not whether the tax collector is bound in law to receive the coupon, notwithstanding the legislation which, on its face, prohibits him from doing so, nor whether, if he refuses to take the coupon and proceeds with the collection of the tax by force, he can be made personally responsible in

damages for what he does, but whether the obligation of the contract has been impaired by the changes which have been made in the remedies for its enforcement in case he refuses to accept the coupons. We decide only the question before us."

My next proposition is that, after a tax-payer has tendered to the collector that which the collector ought to receive, the State's right to levy on that tax-payer's property is ended and done.

It is perfectly settled law that the landlord cannot levy upon the tenant's goods after the tenant has tendered him that which he ought to receive.

"John Matrever's case it is held by the Court that if the lord, or his bailiff, comes to distrain, and, before the distress the tenant tenders the arrears upon the land, then the distress taken for it is tortious."

The Six Carpenters' Case, 8 Coke's R., 147.

"So if the rent had been due when the lord came to distrain, and the tenant had tendered the rent, and notwithstanding the lord distrained; or, if the distress had been taken in the highway, within the lord's fee, and the tenant had made no tender; yet in either of these cases the tenant may rescue without the guilt of a dissension; because, in the first case, the distress *after the tender* was unlawful, for he had no right to those pledges to enforce the payment of a debt which was offered to be paid, and the distress in the highway was unlawful because prohibited by the statute, that being a place privileged for the encouragement of commerce; and consequently, the rescue cannot be said to be a depriving the lord of means which he had no right to make use of, and so it is in the case of every unlawful distress."

Gilbert on Rents, 103–4.

The real reason why there can be no distress after a lawful tender and refusal is that the tender *pays the debt*. There is no debt due to levy for after the tender.

"Now, it may be observed that in every contract by which a party binds himself to deliver goods or pay money to another, he in fact engages to do an act which he cannot completely perform without the concurrence of the party to whom the delivery or the payment is to be made. Without acceptance on the part of him who is to receive, the act of him who is to deliver or pay can amount only to a tender. *But the law considers a party who has entered into a contract to deliver goods or pay money to another as having, substantially, performed it, if he has tendered the goods or money to the party to whom delivery or payment was to be made.*" Rolfe, Baron, in Startup *v.* MacDonald, 6 Man & Granger, 610.

"The plea of tender is in truth a plea of performance of the contract as far as the party contracting can perform it, and where money is to be paid, the debtor cannot pay unless the creditor will receive it; a tender, therefore, at the time it is due is sufficient, because it is a payment as far as a debtor can pay."

Parke, Baron in Dobie *v.* Larkan, 10 Exch., 778.

In Allan, Exor. *v.* Westbrook, 1 Wilson R., 115, plaintiff's testator deposited a bond for £300 with defendant as collateral security for a loan of £22. When the money became due it was tendered and refused. The plaintiff sued the defendant for his bond. There was a question of variance, which caused the Court to take time to consider, but each Judge promptly expressed himself on the effect of the tender.

LEE, *Ch. J.:* "I give no opinion, but as at present advised think the plaintiff is well entitled to bring this action in the manner he has done, and the evidence is sufficient to support it, that the tender and refusal of the £22 amounts to payment."

DENNISON, *J.:* "In the present case, as the money was tendered and refused, I consider it as paid."

"There are some cases in which it has been held that where one party has satisfied the other as far as he could by tendering the money agreed, &c., which was refused, it may be pleaded." GROSSE, *J.*, in James *v.* David, 5 D. & E., 143.

"Ordinarily, nothing less than actual performance satisfies an engagement to do an act. But in acts which require the concurrence of both parties, if one party does all he can to perform his engagement, and the act remains undone, merely for the want of the concurrence of the other party, the party doing all in his power is entitled to the benefit of an actual performance. I speak not of the *semper paratus* and the *probert hic in curia*. They are incidental to some, and not to all engagements. It must, therefore, be the non-concurrence of the other party which discharges the defendant from the actual performance. *If one person is bound to pay money or deliver a horse to another, and that other will not receive it when offered, the party making the offer is excused ex necessitate rei from an actual performance.*"

Miles *v.* Huggins, 3 Devereux, N. C. R., 58.

If A promise to pay B one hundred dollars at twelve o'clock on the first day of July at the Washington Monument, and he tender B one hundred gold dollars at twelve o'clock on the first day of July at the Washington Monument, and B refuses to receive the money, A may deposit the money there and go away, and if B should ever sue him he might plead these facts and judgment would go in his favor.

Now, if, however, instead of depositing the money, he elects to put it in his pocket and carry it away, he will undoubtedly be responsible to B for the money, but he will be responsible as a bailee without reward, and not as a debtor. The debt would have been paid by the tender, and his responsibility would be that of a man who officiously takes possession of another man's property, which he must guard and preserve with that care imposed upon him by the doctrine of *Coggs* v. *Bernard*.

This must be so, because, all that the debtor contracts to do is to make a *valid tender* of his debt. He does not contract to *pay* his debt, since he cannot by his contract force the creditor to *receive* payment, and the law will not hold him to have contracted to do that which it is beyond his power to do.

If this be not the full import and extent of the debtor's promise—if he remains bound to the creditor as debtor, after a valid tender and refusal, then it follows that if he be robbed by thieves on his way home, or if the public enemy take the money from him, or if it be swallowed up in an earthquake, he must nevertheless still pay his creditor when demand is made upon him. This, surely, cannot be. If A was at the Washington Monument at twelve o'clock on the fourth of July, and tendered one hundred gold dollars to B, according to the terms of his contract, which B refused, and on his way home he was robbed of the money, the loss must surely fall upon B and not upon A. Yet, unless the debt was paid by the tender and A by retaining possession of the money had simply converted himself into a bailee without reward, he would still be bound to produce the money in Court when sued. But I insist that if B sued him after that it would be a good plea for him to show that he tendered it according to the terms of his contract; that B refused to receive it, and that he was robbed of it while returning home, and that this plea would be a good substitute for the production of the money in Court. In *Jeter* v. *Littlejohn*, 3 Murph., N. C. R., 186, the Court distinctly recognizes the principle that a debtor cannot be compelled to preserve money *as debtor*, after a tender and refusal. Speaking of a tender that had been made during the troubled and perilous times of the Revolution, it says: "Is it reasonable that a debtor should be required to preserve it"—the money tendered—"through a long period of such civil convulsions as that which occurred after the tender was made?"

This is certainly true of a contract to deliver specific articles.

"If the debtor be present in person, or by his agent, and

makes a tender of specific articles at the proper time and place, according to contract, and the creditor does not come to receive them, or refuses to accept them, the better opinion is that if the article be properly designated and set apart, the debt is thereby discharged. * * * * * * But in *Weld* v. *Hadley*, it was decided, after a very able discussion, that on a tender and refusal of specific articles, the property did not pass to the creditor. This was contrary to the doctrine declared in other cases; and the weight of argument, if not of authority, and the analogies of the law, would appear to lead to the conclusion that, on a valid tender of specific articles, the debtor is not only discharged from his contract but the right of property in the articles tendered passes to the creditor. *The debtor may abandon the goods so tendered; but if he elects to retain possession of the goods it is in the character of bailee to the creditor and at his risk and expense.*" 2 Kent's Com., p. 509 (marg).

"The tender of specific articles on the day appointed at the place specified for the performance, is a satisfaction of the contract, when a note is payable in specific articles; and, if the tender be not accepted, the right of action is not revived by a subsequent demand and refusal. *In such case the relation of the parties is changed to that of bailor and bailee.*"

Bacon's Abridgment, Wilson's and Bouvier's Ed. (1852), Tender (F).

"It is true that property tendered is not *lost* to the creditor by his neglect or refusal to receive it; but it is also true that, in the case of a tender of specific articles, the Courts in this State consider the contract to deliver or pay such articles discharged. *The tender, properly made, is a satisfaction of the demand; the debt is paid, and the articles tendered become the property of the creditor, and afterwards are kept at his risk and expense.* In the case of *Slingerland* v. *Morse*, 8 Johns. R., 478, the Court say "We consider it (the tender), a complete bar to the suit upon the contract." In *Shelden* v. *Skinner*, 4 Wend., 528–9, this subject was again considered

by this Court, and such a tender held analogous, as it was in the last case cited, to the French consignation, whereby the debtor is discharged, the creditor must resort to the specific articles, and to the person who tendered them as the *bailee* thereof. The relation of debtor and creditor no longer subsists between these parties, but that of *trustee* and *cestui que trust*, or bailor and bailee."

Lamb *v.* Lathrop, 13 Wend., 97.

Now, if it be true that the promisor of specific articles is discharged from his debt by making a valid tender, why should not the promisor of money be likewise discharged from his debt by making a valid tender? What difference is there between the two contracts? There is no difference. Each is a contract by the debtor *that he will offer* to deliver the thing promised at the time and place agreed on, and that is the full limit of each promise. In neither contract does the debtor promise that he will *deliver*, since to deliver requires the assent of the creditor, and he cannot force him to give that assent against his will, and the law will not hold the promisor to have contracted to do an impossible thing.

It is true that statements can be found in text books, and in the opinion of judges that the person who tenders specific articles is discharged from his contract, but that he who tenders money that is refused is not discharged from his contract; and the reason given is that it would be unreasonable to hold a party bound after he has tendered specific articles, because they are cumbersome, and he ought not to be compelled to carry away cumbersome and burdensome articles. Whereas it gives him no inconvenience to carry away money in his pocket, and therefore he ought to remain chargeable therefor. I submit that this reasoning is wholly unsatisfactory. It is utterly inconsistent with the nature of the contract that the parties have made. It assumes to change the contract that the parties entered into, into such an one as the Court thinks that they ought to have made. There is no

more reason to suppose that a debtor who promises to pay money at a time and place named intends to remain bound as a debtor, and to take the risks of preserving the money from thieves after he has tendered it according to his promise, than there is to suppose that the debtor who promises to deliver a hundred bushels of wheat at a time and place named intends to burden himself with the care of that wheat after he has offered it according to his contract.

Now I submit that the basis of the plea "*tout temps prist*" is the fact that no debtor owing money ever yet left the money at the place agreed on, and took the risk of that being a defence. I insist, therefore, that the necessity for the plea of "*tout temp prist*" has arisen from the fact that in all cases of tender of money and refusal, the debtor has chosen to keep the money in his pocket, and has thereby made himself *bailee* of it, and the plea intends to say that if he is bailee of it, he must always be ready to deliver it to the bailor when it is demanded.

Instead, therefore, of the law being that a plea of tender must contain the averment "*tout temps prist*," correctly stated, the law is that a plea of tender must show, either that the debtor left the money at the place agreed on, or, if he brought it away, that he has always since been ready to deliver it to the debtor on demand, or that after leaving the place of tender he was deprived of the money by some accident that would constitute a defence for a bailee of property without reward.

I have been able to find no case in which a debtor pleaded that after he had tendered the money he was deprived of it by such force as would have constituted a defence for a bailee without reward. In all the cases that I have examined, in which it has been said that the tender does not pay the debt, the fact has been that after the tender, the debtor retained possession of the money and had not lost it through superior force. Consequently, in every such case, the judges have said more than they were required to say, when declaring that a tender does not pay the debt. I insist, therefore, that the

doctrine that a tender does not pay the debt rests upon *dicta* solely, and not on decisions, and that when critically examined, such dicta are found to be incorrect expositions of of the law.

The proposition that a legal tender pays the debt is clearly contained in the case of *Clarke* v. *Tyler*, 30th Gratt., 137. Anything else is inconsistent with the judgment in that case.

The facts were that Clarke had been adjudged to pay a fine, and to be imprisoned until the fine was paid. He tendered the officers who had him in custody a coupon in payment of his fine, and upon the coupon being refused, he applied to the Supreme Court of Appeals to be discharged from custody on a writ of *habeas corpus*. The Court was confronted directly with the question whether or not Clarke's duty was discharged. He was in possession of the coupon—that is, the State's officers were not in possession of it, and was his debt paid whilst the State had not received what would solve it, was the question before the Court. The Court held that having tendered that which was a legal tender, he was entitled to his discharge, and it did actually discharge him from custody. This could not have been done unless the Court first held that the debt was paid, for the judgment under which he was held was that he should be kept in jail until the fine was paid. In delivering the opinion of the Court, Christian, *J.*, says, at page 141:

"But in point of fact, the judgment for the fine is discharged to its full extent, so far as the State is concerned, because the coupon represents the obligation of the State for the face value of the coupon offered in payment of the fine."

In concluding the opinion of the Court he says, at page 145:

"It only remains for me to say that the petitioner has the right under the law to discharge the fine imposed upon him by the Hustings Court with a coupon of a bond of the State, which the State has agreed to receive in payment of 'all taxes, debts, dues and demands due the State,' and that he must be discharged from further custody."

Now, in saying that the prisoner *had the right* to

discharge the fine with a coupon the Court meant that he *had discharged* the fine by tendering the coupon, for it discharged him from custody, and made no order at all in respect to the coupon. It made no provision whatever for the State getting the coupon. It utterly ignored all relations between the State and the prisoner from the moment when the coupon was tendered and refused. The report of the case does not show this, but I have filed a certified copy of the record of the case with the clerk, and from that it appears that the Court discharged the prisoner unconditionally. The prisoner's petition averred that he brought the coupon into Court, and that he was willing that the officer should take the same upon giving him a receipt in full. The Court took no notice of this averment, and simply ordered the prisoner's discharge, leaving the officer to get the coupon as he best could. See the order printed below in note.*

If a prisoner sentenced to pay a fine and to remain in jail until it is paid, can procure his discharge from custody by showing that he has offered coupons for the fine, can it be that a tax-payer's property can be seized for the tax after he has tendered a coupon?

So effective at common law was a valid tender, that when a mortgagor tendered what he owed, although the legal title

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* VIRGINIA:

In the Supreme Court of Appeals, held at the State Court-house in the City of Richmond, on Friday, the 5th day of April, 1878.

This day James Clarke was brought into Court by James M. Tyler, sergeant and jailor of the City of Richmond, in obedience to the writ of habeas corpus yesterday awarded, and to the said sergeant directed; and the said sergeant having made a return to said writ, which the Court, for reasons stated in writing and filed with the record, deemed to be insufficient, and the Court being of opinion that the petitioner James Clarke was entitled to discharge the amount of the fine imposed upon him by the said Hustings Court of the City of Richmond, in past due coupons of the State, and that said Clarke is, therefore, illegally detained in custody; it is therefore ordered that he be discharged.

(A Copy.)

Test., GEO. K. TAYLOR, *C. C.*

was in the mortgagee, and although he might be in possession of the premises, yet if he refused the tender, it reinvested the mortgagor with the legal title so that he might bring ejectment upon it.

Litt. Sect. 334 *et seq.*
Co. Litt. 206 A. *et seq.*
Wade's Case, 5 Rep., 115.
Merrit *v.* Lambert, 7 Paige Chy., 344.
Farmer's Ins. Co. *v.* Edwards, 27 Wend., 541.
Kortright *v.* Cody, 21 N. Y., 343.
Frost *v.* Garkers Savings Bank, 70 N. Y., 553.
Caruthers *v.* Humphrey, 12 Mich., 270.
Van Husen *v.* Kenmore Bank, 13 Mich., 303.
Cram *v.* McGoon, 86 Ill., 431.

It is the settled law of this Court that a tender of that which ought to be received for a tax produces exactly the same effect, so far as the rights of the tax-payer are concerned, as a receipt to the officer of what is tendered.

Bennett *v.* Hunter, 9 Wall., 326.
Tacey *v.* Irwin, 18 Wall., 549.
Atwood *v.* Weems, 99 U. S., 183.
Kaufman *v.* Lee, 106 U. S. R., 196.

The case of Thorndike *v.* U. S., 2 Mason, 1, is the same as the case under consideration.

In 1814 the United States Government issued certain treasury notes which it agreed, by the act providing for their issue, should be receivable in payment of all taxes and debts due to the United States. After this, one Thorndike, a collector of customs, fell in default to the Government some $27,000. When demand was made upon him for payment, he tendered $27,000 of these notes. They were refused and suit was brought against him and he pleaded the tender. The case was tried before Judge Story, who held that the tender of the notes was a legal tender and that the Government should take nothing by her writ.

Thorndike *v.* U. S., 2 Mason, 1.

It is difficult to perceive any difference between that case and the case of a Virginia tax-payer suing a tax-collector for an injury growing out of the collector's refusing coupons. If Thorndike was in no default, after tender of the Government's notes, it is difficult to understand how a Virginia tax-payer would be in default so as to justify a collector's levying upon his property after tender of a coupon. Can it be conceived that Judge Story would have held a United States officer justified in levying after Thorndike had tendered his notes?

WM. L. ROYALL,
For Plaintiff in Error.

109-619

BURGOYNE (Law Tel. 587), 57, 59 & 61 Park St.

OFFICE SUPREME COURT U. S.
OCT 29 1883
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1883. No. 970.

A. AUSTIN SMITH,
Plaintiff in Error,

AGAINST

SAMUEL C. GREENHOW.

Brief on Appeal from order remanding cause.

I. In this case an opinion of the Circuit Court was filed, which is printed in the record. It decides not only this case, but several cognate ones. Its positions are ample and conclusive, so far as any question might otherwise arise as to the jurisdiction of the Circuit Court in a suit of this character, where plaintiff and defendant are not citizens of different states. Of this case it says merely:

"As to the fourth case named this is a mere action of trespass for damages, in which no question of a Federal character is raised by the pleadings. The cause must be remanded to the State Court from which it was removed."

The "pleadings" which are to be looked into by the Court to determine whether a Federal question is raised include the pleadings in the State Court as well as the petition for removal.

Before, therefore, a Circuit Court can be required to retain a cause under this jurisdiction, it

must in some form appear upon the record, by a statement of facts, "in legal and logical form, such as is required in good pleading" (i Chit. Pl. 213), that the suit is one which really and substantially involves a "dispute" or "controversy" as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States. If these facts sufficiently appear in the pleadings, the petition for removal need not restate them; but, if they do not, the omission must be supplied in some form, either by the petition or otherwise.

Gold W. & W. Co. vs. Keyes, 96 U. S., 199.

The petition for removal is as follows:

Your petitioner would respectfully show that by inspecting the pleadings and proceedings in this suit, it will appear that it arises under the constitution of the United States, and is, therefore, removable by either party to the Circuit Court of the United States, for the Eastern District of Virginia.

The Court is here simply referred to the pleadings in the State Court. The substance of these is as follows:

1. *Declaration*, that property of plaintiff has been seized by the defendant.

2. *Plea*, that defendant was treasurer of the City of Richmond, and that the trespass complained of was merely the collection of taxes which plaintiff owed, and which the law made it defendant's duty to collect.

3. *Replication*, that before said trespass plaintiff had tendered payment in coupons. That said coupons were issued in pursuance of an Act of the Legislature of said State, approved March 28th, 1879, and contained the promise of the State that they should be received in payment of all taxes due

the State; and they were due and past maturity. That plaintiff had, since the said tender been always ready and willing to deliver said coupons in payment of said taxes.

4. *Rejoinder*, that nevertheless a subsequent law of Virginia, enacted January 26th, 1882, required plaintiff to refuse to receive said coupons, and plaintiff was thereupon required to collect.

5. *Demurrer* (in the form prescribed by the Virginia Code), that the defendant's rejoinder is not sufficient in law.

Here are two facts, both undisputed, a continuing tender of payment in coupons, and a subsequent seizure of property by way of forcible collection of the amount in other funds.

A question of law is also brought into full view. A law of the State is cited, and a contract right to make payment in coupons is claimed under that law.

Without controverting this right, a right to collect nevertheless is claimed under a later law. This later law gives beyond doubt a superior right, unless the contract right arising from the earlier law prevails by virtue of the Federal Constitution.

There is no question of fact, and no other question of law can possibly be in the case.

There remains therefore only to be considered whether this question of law is by the pleadings sufficiently presented as a federal question.

The plaintiff sets up a contract with the State, made in pursuance of its own express legislation. This legislation has been once and again held by this Court to make a valid contract.

The defendant sets up a later law, which plaintiff claims impairs the obligation of his contract. In R. R. Co. vs. Mississippi 102 U. S., 135, it is held by this Court that a federal question may be raised in a sense sufficient to authorize removal, by either party and at any point in the succession of the pleadings.

II. The foregoing suggestions end, in my judgment, the proper discussion of this appeal.

I should be glad to leave it there, but for the view expressed, in another of these Virginia bond cases, by the Circuit Court from whose order this appeal is taken.

The suit of the *Baltimore & Ohio R. R. Co. vs. Allen et al.*, XVII *Federal Reporter 171*, was an original suit in the Circuit Court, to restrain the defendant from levying on the property of the plaintiff after tender of coupons in payment of the taxes. An injunction *pendente lite* was allowed. A formal opinion was read in support of the order allowing the writ. The right to relief in equity is, in that opinion, grounded in part upon the want of an adequate remedy at law, and on that head the Court say:

> "The complainant has no adequate remedy at law. The writ of mandamus is of no avail to it; it has paid its debt once, and would have to pay it again to get that remedy; it cannot get its goods back from the purchaser by replevin, for there is no such action in Virginia; *it cannot sue the tax-collector for trespass, for since the institution of the suit of Antoni and Greenhow this State has by law forbidden it to do so.* Altogether, it seems to me the complainant would be remediless and its 'right' a delusion, did not a Court of Equity listen to it."

From this it follows necessarily that while this suit was remanded by the Circuit Court upon no

other express ground than because, in the judgment of the Court, there was no Federal question in the pleadings; yet, had the case been otherwise, the suit must still have been remanded, because, in the judgment of that Court, the suit was never "commenced in" the State Court. A suit which, by the law controlling a State Court, is put expressly beyond the jurisdiction of that Court, can hardly be said to be "commenced in" it in the sense in which those words are used in the removal acts, unless the law in question be itself for some reason invalid. A suit in Admiralty is no more completely beyond the jurisdiction of a divorce court, for example, than this suit is beyond the jurisdiction of the Court in which it was commenced, if the Act of January 26, 1882, possesses in this particular the force the Circuit Court ascribes to it. Hence it seems clear that justice to the Circuit Court requires of this Court that the two opinions be read together, and the Court considered as refusing on both grounds to entertain the suit. The question is in no sense one of remedial equivalents. Every species of redress is withdrawn, and from all Courts, for a seizure made where the tax payer refuses to pay money merely on the ground that he wishes to pay in coupons. The opinion of the Circuit Court is express, 1, that in such case he cannot "commence in" a State Court a suit in the prevailing method for redress. 2, that his injury is nevertheless one which entitles him to redress. 3, therefore, as also upon other grounds, he is entitled to relief in equity.

The substantial question being, on this appeal, whether the Circuit Court shall proceed with the suit, or shall remand it, to dispose properly of the appeal, apparently requires that this Court deter-

mine both of the points raised by the Circuit Court as to its own right to proceed.

It is moreover possible that in the paragraph quoted above, from the opinion in the case of *B. & O. R. R. Co. vs. Allen et al.*, and in which mention is made of the inability of the plaintiff in that case to "get its goods back from the purchasers by replevin," the Circuit Court had in mind its own action in the matter which was before this Court in *Ex-parte, Baltimore & Ohio R. R. Co., 2d Supreme Court Reporter, 876.*

The judgment of the Circuit Court, which on that motion this Court refused to review, is found in 16th Federal Reporter, 161. In that case the Court uses this language:

> Now, on a like case, that is in a case where a person is complained of for taking possession of and holding the chattels of another wrongfully, the courts of Virginia are not permitted to give the writ of replevin to a plaintiff to remedy his wrong; and as we must follow their form and mode of proceeding in such a case, we are not at liberty to issue that writ, but must follow the State's form and mode, whatever they may be.

The words, "We must follow the State's form "and mode, whatever that may be," do not necessarily, as here used, import more than that where the State law has cut off from the State Court one of several remedies, the Circuit Court will feel bound by a like exclusion. The opinion in. *B. & O. R. R. Co. vs. Allen et al.*, which must be read as *in pari materia*, however, attaches to them a far greater meaning. Together, and in connection with the remark quoted above from the opinion filed in this case they express the ~~reported~~ repeated and unmistakable opinion of the Circuit Court, that under existing laws a suit for trespass such as the case at bar, cannot be properly "commenced in" the State Courts

of Virginia, and that such an exclusion is operative upon the Circuit Court. To dispose of this question therefore is plainly necessary to any satisfactory, and possibly to any final, disposition of this appeal.

A decision of this question, whether the suit was properly brought in the State Court, is practically indistinguishable from a final disposition of the cause. I do not propose, however, to follow this line of remark so far as to address the Court on the controlling question of the case. I have simply felt it my duty to call the attention of this Court to the position of the Circuit Court, repeatedly advanced. As to going beyond this, I prefer to rest on the suggestion and request that if this Court concludes that this appeal requires a final disposition of the cause, a further argument will be directed.

WAGER SWAYNE,
Of Counsel for Plaintiff in Error.

Oct. 26, 1883.

109-669

SUPREME COURT U.S.
FILED
DEC 5 1893
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

970

A. AUSTIN SMITH v. SAMUEL C. GREENHOW.

972.

SAMUEL S. CARTER v. SAME.

971

WILLIAM L. WHITE v. SAME.

BRIEF AND ARGUMENT OF ATTORNEY-GENERAL OF VIRGINIA FOR APPELLEES.

IN THE

Supreme Court of the United States.

A. AUSTIN SMITH v. SAMUEL C. GREENHOW.

SAMUEL S. CARTER v. SAME.

WILLIAM L. WHITE v. SAME.

BRIEF AND ARGUMENT OF ATTORNEY-GENERAL OF VIRGINIA FOR APPELLEES.

Since the very elaborate opinions of this court in the cases of Louisiana *vs.* Jumel, Elliott *vs.* Wiltz, and in the case of Antoni *vs.* Greenhow, touching the entire subject of coupon contracts, I deem it unnecessary to do more than to reproduce my brief in Antoni *vs.* Greenhow, and cite the following additional cases that bear on the power of a Federal court to enjoin a state in the collection of her revenues, or to sue her officers for such damages as may arise from levies for taxes.

These cases, I think, will show that the United States circuit court at Richmond "transcended its jurisdiction, violated comity, and committed a trespass upon the most vital rights of the states":

State Railroad Tax cases, 92 U. S. R., 613-17; Dow *vs.* Chicago, 11 Wallace, 108; Hannewinkle *vs.* Georgetown, 11 Wallace, 547; Tennessee *vs.* Sneed, 96 U. S. R., 69.

I add to my brief, also, the very able and exhaustive opinion of Judge Robert W. Hughes, United States district judge for the Eastern district of Virginia, sitting in the circuit court 15th May, 1883, in Baltimore and Ohio R. R. *vs.* J. E. Hamilton, collector, and others, which discusses most of the points involved in the present case.

On the 20th day of March, 1882, Andrew Antoni, a tax-payer and citizen of the city of Richmond, Virginia, presented his petition to the honorable judges of the supreme court of appeals of Virginia, in which he represented that as such citizen and tax-payer he owes to the state of Virginia taxes to the amount of three dollars and fifteen cents; that he is the owner of property in said city, and that as such tax-payer, on that day, he had tendered to the said Samuel C. Greenhow, who was then, and is now, the treasurer of the city of Richmond, charged by law with the duty of collecting the taxes due to the state of Virginia in said city, a coupon for $3, which was due and past maturity, and which coupon he avers was cut from a bond of the state of Virginia, issued under the provisions of the act of the General Assembly of Virginia, passed March 30, 1871, found in Acts of 1870-71, chapter 282, page 378, and commonly known as the "funding bill," together with fifteen cents in lawful money of the United States, making in all $3 15 cents, in payment of the taxes aforesaid, due by him to the state of Virginia.

He complains that the said treasurer refused to receive the said coupon and money in discharge of the amount of the taxes due by him. He avers that the said coupon tendered by him was cut from a bond of the state of Virginia, issued under the provisions of the aforesaid act for $100, numbered 6,498, and that the same is coupon No. 21 of the coupons attached to said bond, and that the same is as follows, to-wit:

"Receivable at and after maturity, for all taxes, debts and demands due the state.

"The commonwealth of Virginia will pay the bearer three dollars interest due the 1st of January, 1882, on bond 6,498.

"GEORGE RYE,
"*Treasurer of the Commonwealth of Virginia.*

"Coupon No. 21."

The said Antoni further avers that the state of Virginia issued and put out her aforesaid bond, with aforesaid coupon attached thereto, and that she thereby entered into a contract with the person to whom she

issued said bond, and with whoever might be the bearer of the said coupon, that she would receive the same in payment of taxes due to her at its face value, and that the refusal of the said treasurer injured and aggrieved the said petitioner; wherefore, he prayed that a writ of *mandamus nisi* might be issued to said treasurer, commanding him to receive from the said Antoni the coupon and money aforesaid, in full payment of the said taxes due by him to the state.

Upon that petition a rule was awarded against the said treasurer, returnable on the 30th day of March, 1882, which rule was duly executed on said treasurer, and who, by the attorney-general, made return thereto in the following words:

"Samuel C. Greenhow, treasurer of Richmond city, is ready to receive said coupons in payment of such taxes, debts and demands named in the petition of Andrew Antoni, as soon as they have been legally ascertained to be genuine, and the coupons which, by law, are actually receivable."

This is the form of return prescribed by act hereinafter named, and, of course, is a traverse of the allegations of petition.

But from abundance of caution he made the following additional return:

The respondent, Greenhow, treasurer, by way of other and further amendment of his return in this case, if under the return already made, the court should conclude that this defence cannot be made known, responds and says:

1. That this court has no jurisdiction to entertain the said petition for *mandamus*, because the act of 14th of January, 1882, gives a plain, adequate, and complete remedy at law.

2. By chapter 44 of Code of 1873, the mode of procedure for claims against the commonwealth is prescribed, and that remedy is plain, adequate, and complete.

3. The remedy by *mandamus* is only granted by chapter 156, section 4, according to the principles of the common law and to prevent a failure of justice.

4. Because by an act of the General Assembly, approved March 7th, 1882, jurisdiction by *mandamus*, in cases of this character, is withdrawn by the General Assembly from this court.

5. By the Acts of 1874–5, page 253, no judgment or decree against the commonwealth shall be paid without a special appropriation therefor by law.

6. Because the said act of the 30th of March, 1871, is unconstitutional and void.

A. It violates the 10th section of the 1st article of the constitution of the United States.

B. It violates the 8th section of the 8th article of the constitution of Virginia.

C. It deprives subsequent Legislatures of their power and control over the collection and disbursement of the revenues of the state.

For these causes, in addition to the causes assigned in the general return, respondent prays that the prayer of the petition may not be granted for a peremptory *mandamus*, but that the petition be dismissed with costs for the respondent.

To this return the attorney for the petitioner demurred for this, that the said return was insufficient in law; in which demurrer the attorney-general for said treasurer joined, and thus the question is presented to the court, is the said petitioner entitled to a peremptory *mandamus* to compel the said treasurer to receive from the said Antoni the said coupons?

The General Assembly of Virginia, at its session of 1882–3, passed an act known as chapter 7, "to prevent frauds upon the commonwealth and the holders of her securities, in the collection and disbursement of revenues," approved January 14, 1882, and is as follows:

Whereas bonds purporting to be the bonds of this commonwealth issued by authority of the act of March thirtieth, eighteen hundred and seventy-one, entitled an act to provide for the funding and payment of the public debt, and under the act of March twenty-eighth, eighteen hundred and seventy-nine, entitled an act to provide a plan of settlement of the public debt, are in existence without authority of law; and whereas other such bonds are in existence which are spurious, stolen, or forged, which bonds bear coupons in the similitude of genuine coupons, receivable for all taxes, debts, and demands due the commonwealth; and whereas the coupons from such spurious, stolen, or forged bonds are received in payment of taxes, debts, and demands: and whereas genuine coupons from genuine bonds, after having been received in payment of taxes, debts, and demands, are fraudulently reissued and received more than once in such payments; and whereas such frauds on the rights of the holders of the aforesaid bonds impairs the contract made by the commonwealth with them, that the coupons thereon should be received in payment of all taxes, debts, and demands due the said commonwealth, and at the same time defrauds her out of her revenues; therefore, for the purpose of protecting the rights of said bondholders and of enforcing the said contract between them and the commonwealth, and of preventing frauds in the revenue of the same,

1. Be it enacted by the General Assembly of Virginia, That whenever any tax-payer, or his agent, shall tender to any person whose duty it is to collect or receive taxes, debts, or demands due the commonwealth, any papers or instruments in print, writing, or engraving, purporting to be coupons detached from bonds of the commonwealth issued under the act of eighteen hundred and seventy-one, entitled an act to fund the public debt, in payment of any such taxes, debts, and demands, the person to whom such papers are tendered, shall receive the same, giving the party tendering, a receipt, stating that he has received the same for the purpose of identification and verification.

2. He shall at the same time require such tax-payer to pay his taxes

in coin, legal tender notes, or national bank bills, and upon payment, give him a receipt for the same. In case of refusal to pay, the taxes due shall be collected as all other delinquent taxes are collected.

3. He shall mark each paper as coupons so received, with the initials of the tax-payer from whom received, and the date of receipt, and shall deliver the same, securely sealed up, to the judge of the county court of the county, or hustings court of the city, in which such taxes, debts, or demands are payable. The tax-payer shall thereupon be at liberty to file his petition in said county court against the commonwealth. A summons to answer which petition shall be served on the commonwealth's attorney, who shall appear to and defend the same. The petition shall allege that he has tendered certain coupons in payment of his taxes, debts, and demands, and pray that a jury be impanneled to try the question as to whether they are genuine, legal coupons, which are legally receivable for taxes, debts, and demands. Upon this petition an issue shall be made in behalf of the commonwealth, which shall be tried by a jury, and either party shall have a right to exceptions on the trial, and of appeal to the circuit court and court of appeals. If it be finally decided in favor of the petitioner, that the coupons tendered by him are genuine, legal coupons, receivable for taxes, and so forth, then the judgment of the court shall be certified to the treasurer, who, upon receipt thereof shall receive said coupons for taxes, and shall refund the money before then paid for his taxes by the tax-payer, out of the first money in the treasury, in preference to all other claims.

4. Whenever any tax-payer shall apply to any court in this commonwealth for a mandamus to compel any person authorized to receive or collect taxes, debts, or demands due the commonwealth, to receive coupons for taxes, it shall be the duty of such person to make return to said mandamus, that he is ready to receive said coupons in payment of such taxes, debts, and demands as soon as they have been legally ascertained to be genuine, and the coupons which by law are actually receivable. Upon such return, the court before whom the application is made, shall require the petitioner to pay his taxes to the tax-collector of his county or city, or to the treasurer of the commonwealth; and upon filing the receipt for such taxes in such court, the said court shall direct the petitioner to file his coupons in such court, which shall then forward the same to the county court of the county, or hustings court of the city, where such taxes are payable, and direct said court to frame an issue between the petitioner, as plaintiff, and the commonwealth, as defendant, as to whether the coupons so tendered are genuine coupons, legally receivable for taxes. On the trial of the cause, the attorney for the commonwealth in the lower courts, and the attorney-general in the supreme court of appeals, shall appear for the commonwealth, and require proof of the genuiness and legality of the coupons in issue. Either party shall be entitled to exceptions, and an appeal to the circuit court and supreme court of appeals on the trial of this issue. If the decision be finally in favor of the petitioner, the mandamus shall issue requiring the coupons to be received for said taxes, and so forth, and they shall be so received; and on the certificate of such judgment, the treasurer of the commonwealth shall forthwith refund to the tax-payer the amount of currency or money before them paid by him for taxes, out of the first money in the treasury, in preference to all other claims.

5. This act shall be in force from its passage.

This case presents some questions of the first impression in this state, but I am not wholly without the aid of home adjudications to cast light on the subject matter by inference and analogy, and much aid is furnished by recourse to fundamental law and the decisions of other states. It will at once occur to the court, however, that the meagre time allotted me for its preparation will not at all comport with the dignity, gravity and novelty of this case. It is proper, at the very threshold of this argument, to state that the act of the 14th of January, 1882, relied on by the commonwealth, neither repudiates or seeks to readjust or settle at a less amount than par, one stiver of the state debt, nor does it seek to exonerate the state from the payment of a single genuine coupon.

Against the writ I interpose and show the following causes why it should not be made mandatory, and the prayer of the petitioner granted:

1st. I interpose the jurisdictional objection, that this court has no cognizance of *mandamus*, as there exists an adequate and specific remedy at law in the ordinary forms of legal procedure, and that therefore, from the very nature and origin of the writ of *mandamus*, no relief by it can be afforded. To sustain this view, I beg to refer to "High on Extraordinary Legal Remedies," chap. 1, sec. 15, top page 17, edition 1874. There it is stated that it results from the very nature and origin of the writ that it was introduced to afford relief only in extraordinary cases where the laws presented no adequate remedy; therefore one of the first questions to be determined in all applications for the writ of *mandamus*, is the existence or non existence of an adequate and specific remedy at law.

By 16th section, "Wherever an express remedy is afforded by statutes, plain and specific in its nature and fully adequate to redress the grievance complained of, *mandamus* will not lie."

Again: 17th section says: "If the existing remedy is adequate to place the injured party in the same position he occupied before the injury or omission of duty complained of, it will prevent the interposition of the courts by *mandamus*."

This authority is supported in the foot notes by an unbroken line of English and American decisions, including the case of King William Justices *vs.* Munday, 2d Leigh, page 165, marg., where the court unanimously held that *mandamus* never lies if there is another specific legal remedy for the party complaining. That was a case by *mandamus* to compel the county court of King William to levy a particular sum of money for county purposes. The court unanimously dismissed the *mandamus*, because a specific remedy was given by statue to recover the same by action of debt against the justices refusing to make the

levy. The opinion of Carr, J., page 169, marg., is so pointed and decisive of my first objection, that I dispatch this point by asking the court's examination of the same.

Under this act, approved 14th January, 1882, and known as the "Act to prevent fraunds upon the commonwealth, &c," the 3d section thereof gives to the coupon holder a speedy, effective and most economic remedy for the enforcement of his coupon against the commonwealth, and if upon trial by the jury prescribed, the said coupon should be proven to be genuine, and such as by law is actually receivable, it is ordered that the holder be repaid.

Nowhere does that act conflict with section 10, article 1, constitution of the United States, and the fourteenth section of article 5, constitution of Virginia, which forbid the passage of "any law impairing the obligation of contracts." The act merely relates to, effects, and modifies the remedy for the enforcement of the collection of the coupons. The act itself is founded on reason, public policy, and above all, upon the self-preservation of the life of the commonwealth itself. If all the bonds and coupons uttered under the said funding bill of March 30, 1871, were genuine, real, and authentic, there could be no necessity for that act; but in the preamble of the said act, the General Assembly of Virginia have solemnly declared, and the governor of the commonwealth has approved the declaration, that bonds purporting to be the bonds of this state, issued by authority of the act of March 30, 1871, entitled an act to provide for the funding and payment of the public debt, as well as under the act of March 28, 1879, entitled an act to provide a plan of settlement of the public debt of Virginia, *are in existence without authority of law;* and that other such bonds are in existence which are spurious, counterfeit, forged, stolen, and of false character, and which bonds bear spurious and fraudulent coupons, in the similitude of genuine coupons, receivable for all taxes, debts, and demands due the commonwealth; and that the said coupons from such spurious, stolen, and forged bonds are now being received by the state in payment of taxes, debts, and demands; and that genuine coupons, from genuine bonds, after having been *once* received in payment of taxes, debts, and demands, are fraudulently reissued and received more than once in such payments; and that thus such frauds are perpetrated on the rights of the holders of the aforesaid bonds; that the false coupons thereon should not be received in payment of taxes, debts, and demands due the said commonwealth; that the said fraudulent coupons at the same time defraud the commonwealth out of her revenues.

Therefore, and for the purpose of protecting the rights of the said bondholders, both in their bonds and coupons, and of enforcing the contract between them and the commonwealth, and of preventing frauds

against the revenue of the state, the act requires that the tax-payer who tenders to any collector of taxes of the commonwealth, any written, printed, or engraved paper or instrument purporting to be coupons, detached from bonds of the commonwealth, issued under the said funding act of 1871, shall be required to verify and identify the said coupons to be genuine and lawful.

The third section of said act prescribes a plain, adequate, and complete remedy at law for the said tax payer or coupon-holder—a remedy of the most summary, speedy, and economic character is accorded to him. The coupon is received by the tax collector; the initials of the tax-payer endorsed thereon, and the receipt that is given to the said tax-payer is securely sealed up and delivered by said collector to the judge of the county court of the county or the judge of the hustings court of the city in which such taxes are payable. The tax-payer is thereupon at liberty to file his petition in said court against the commonwealth. A summons issues thereon to answer the petition, which should be served on the commonwealth's attorney, who shall appear and defend the same. The petition is required to allege that the tax-payer has tendered certain coupons in payment of his taxes, and praying that a jury be impannelled to try the question whether the said coupons are genuine and legal and legally receivable for taxes; that upon this petition, an issue shall be made in behalf of the commonwealth, which shall be tried by a jury—either party having the right to exception on the trial, and to appeal to the circuit court and court of appeals; and if it be finally decided in favor of the petitioner that the coupons tendered by him are genuine, legal coupons, receivable for taxes, then the judgment of the court shall be certified to the treasurer, who, upon the receipt thereof, shall receive said coupons for taxes, and shall refund the money paid before then (under the second section of this act) for his taxes by the tax-payer, out of the first money in the treasury in preference to all other claims.

We repeat with emphasis, that the act referred to nowhere infracts the contract rights of the coupon holder, but that it merely throws around the commonwealth an *ægis* for her own protection, and that of her bondholders, against the fraud, forgery, and double-funding processes of the unscrupulous.

It is hardly necessary to say that the income or reveue of a state received from her lands, property, and other subjects, constitute the only source from which her expenses can be derived, and that it is her sovereign right to control and regulate the collection and disbursement thereof, as in her sovereign power she may think will best subserve her own interests and that of her citizens. (See Moore's case).

The next cause assigned is that the act known as the funding bill, approved March 30, 1871, is unconstitutional and void. I know that in the light of Antoni *vs.* Wright, 22 Grat., 833, Hartman *vs.* Greenhow, and other cases growing out of the same questions in Virginia, as well the case of Furman *vs.* Nichols, from Tennessee, reported in 8 Wall., and Woodruff *vs.* Trapnell, from Arkansas, which have been so happily commented on and explained by Judge Staples in Antoni *vs.* Wright, and shown not to militate against my present view of this case, it may seem but a waste of time before this court, with its present constitutional and legal convictions, for me to review this objection in this case. My convictions, however, are so fixed that I cannot refrain from presenting, for the consideration of the court, some additional views in that regard, in connection with the present bill. It was held by this court, in Antoni *vs.* Wright, that the receivability of the coupon for taxes was established by the Legislature by a contract with its creditors, and that the character of the receivability could not be destroyed by the same Legislature. Now, I beg to submit that the whole question hinges upon the character and effect of that contract. In Butler *vs.* Pennsylvania, 10 Howard, 416, Daniel, J., said: "The contracts designed to be protected by the tenth section of the first article of the federal constitution, are contracts by which perfect rights, certain definite, fixed, private rights of property are vested. These are clearly distinguishable from measures or engagements, adopted or undertaken by the body politic or state government, for the benefit of all and from the necessity of the case, and according to universal undertanding, to be varied or discontinued as the public may require." Again, Ibid, p. 439, Chief Justice Tanney says: "The powers of sovereignty confided to the legislative body of a state are undoubtedly a trust committed to them, to be executed to the best of their judgment for the public good; and no Legislature can, by their own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body, unless they are authorized to do so by the constitution under which they are elected."

If all the elements of a great and growing commonwealth, with her possessions and resources, and the very life and existence of the state herself, are worthy of consideration, the foregoing words of wisdom, and those to follow now, must cause a pause and exact a calm investigation.

The same court says, on page 489, "it (meaning the Legislature) cannot abridge its own legislative power by making permanent and irrepealable contracts in reference to matters of public interest." The court fortifies this declaration by the following decisions of the supreme

court of the United States: Earl Hartford *vs.* Hartford Bridge Company, 10 How., 517; Gosler *vs.* Corporation of Georgetown, 6 Wheat, 593; Ohio Life Insurance and Trust Company *vs.* Debolt, 16 How., 416.

The wisdom, justice, and necessity alike of the rule are vindicated by the great burthen by which that funding act has oppressed the state in its substance and impoverished the masses in spirit and heart as well as by the great wrong and injustice that have been perpetrated on the peeler bondholders by an unsparing discrimination against their equally meritorious state securities.

I deny that a sovereign state, organized upon the principle of "the greatest good to the greatest number," can abdicate to creditors the control and absorption of her finances, as such a course would leave her without the means of subsistence. The funding bill, in effect, would prostrate her educational system, would close the doors of her colleges and free schools, would destroy the efficiency of her elemosynary institutions, that are designed to dispense charity and relief to our unfortunate, afflicted citizens, and would deprive the state, even, of its ordinary machinery of government, and destroy its autonomy.

Judge Staples enunciated the same rule of action in his dissenting opinion in Antoni *vs.* Wright, 22 Grat., when he affirmed that "one Legislature cannot bind succeeding Legislatures and the public revenue in the manner attempted in the provisions of the funding act." The reasoning of the learned *dissentient* judge would seem to be unanswerable and to supersede the necessity of any further collation of authorities. Judge Robertson, in Burroughs *vs.* Peyton, 16 Grat., 470, declares to the same effect, when he says, "By the term contracts in that clause (meaning the clause impairing the obligation of contracts), it is not meant to include the rights and interests growing out of the measures of public policy. 'Acts in reference to such measures are to be regarded as rather in the nature of legislation than of compact, and although rights or interests may have been acquired by them, these rights and interests cannot be considered as violated by subsequent legislative changes which may destroy them. Whatever in the nature of a contract could be considered to exist, there must be implied in it a condition that the power is reserved to the Legislature to change the law thereafter as the public interest may from time to time appear to require."

From the high position occupied by Hon. Robert W. Hughes, judge of the United States district court for the Eastern district of Virginia, and who is well known as an able constitutional lawyer, I cannot forbear from refreshing the memory of the court with some of his views upon the constitutionality of the tax-receivable coupon feature of the funding act of 1871. In his letter of January the 6th, 1875, to the edi-

tor of the Staunton *Virginian*, he holds: "As early as the days of the *Magna Charta*, and down through succeeding centuries to the present time, notably in their war with the Stuarts, the English people have asserted the principle of the absolute power of each parliament over the revenues raised by taxation during its own term of existence. That right of parliament has been a fundamental canon of the constitutional law of England at all times; and is a cardinal principle of our American policy.

"The coupon feature of the funding act is repugnant to the cardinal doctrine on this subject, which has been held by the constitutional statesmen of England and America, since the principles of popular liberty have had advocates, defenders, or martyrs in either country. Whether any legislature of Virginia shall deem itself bound by it, is only a moral question for its own decision, and not a legal question for the decision of any court whatever. * * * * The tax-gathering coupon, the cut-worm of the revenues, appropriating them each year to itself with impertinent disdain of legislative authority, is a device of modern ingenuity to subject the legislature, in the exercise of its highest constitutional functions, to the power of the judiciary, and is at war with the cherished English and American principle of the mutual independence of the legislative, executive, and judicial departments of government. Any measure which brings these jurisdictions into conflict, and thrusts a court into colorable usurpation, is vicious in the last degree.

"The right of each legislature to control the revenues of the state during the period of its service, cannot, in my opinion, be taken away, either by prerogative or contract, or any other power or device, legislative, executive, or judicial. The revenues of a state derived from taxation, cannot be entailed by any legislature. * * * *

"The attempt of a legislature to obstruct the power of its successors over the revenues for a single year, or for thirty years in advance, is, in my judgment, *ultra vires*, and essentially null and void, nor can any action of such a body, designated to effect such a purpose, be validated by any court whatever in the land."

The foregoing reasoning clearly demonstrates that no civil obligation arises under said funding bill, that it confers no legal right on the coupon holder, and no corresponding legal duty on the commonwealth. It is but *nudum pactum*, and has no binding efficacy or force, and, therefore, the maxim applies in all its force, *ex nudo pacto non oritur actio.*

It may not be improper here to add that Thomas Jefferson, one of the framers of the constitution of the United States, in a letter addressed to James Madison, from Paris, dated 6th September, 1789, and found in the 3d volume of Jefferson's complete works, page 103, says: "The

question whether one generation has a right to bind another seems never to have been started on this or the other side of the waters. Yet it is a question of much consequence, as not only to merit decision, but place also among the fundamental principles of every government. The course of reflection in which we are immersed here on the elementary principles of society has presented this question to my mind, and that no such obligation can be transmitted, I think, very capable of proof. I set out on the ground, which I suppose to be self-evident, that "The earth belongs in usufruct to the living, that the dead have neither power nor rights over it." Page 104: "Then no generation can contract debts greater than may be paid during the course of its own existence. * * * * * When a whole generation dies, and another generation or society succeeds them, there is no superior who can give their territory to a third society, who may have lent money to their predecessors beyond their faculty of paying. The conclusion, then, is that neither the representatives of a nation, nor the whole nation itself assembled, can validly engage debts beyond what *they* may pay in their own time."

I deem the foregoing elaboration of the proposition pardonable, when I reflect that this argument is made in behalf of a state that (upon the authority of Ex-Governor Kemper, in his address to the bondholders conference, held at Richmond on the 10th day of November, 1874, and composed of a committee of foreign and domestic bondholders), lost by the late war "largely more than half of its wealth," and where "in one of the most fertile sections of Virginia the noctural blaze of burning farm buildings, fired by armed invaders, lighted at one time a country extending over a distance of more than sixty miles." And I might further add, in the language of Ex-Governor Henry A. Wise; *clarum et venerabele nomen*, that "the humanities as well as the equities" of this case "are on the side of the wasted and severed state."

I furthermore repeat the argument often presented to this court, that said funding act is in conflict with the 8th section of Article VIII. of the constitution of Virginia, that sacredly devotes the taxes named to the cause of education, and which the funding act, by its coupons applies and diverts to payment of the public debt—and I will again content myself with the reasoning of Judge Staples, on pages 359–60, of 22 Gratt., Antoni *vs.* Wright.

Another serious objection to the said coupon, is that section 10, Article I. of the constitution of the United States declares that "no state shall emit bills of credit." When the coupon was made tax receivable it was made currency thereby; became negotiable in so much as it is payable to bearer and thus it possesses all the elements and attributes of commercial paper, in which of course is included bills of credit.

In connection with the foregoing constitutional objection to the coupon, it would seem clear that a collector should only be required to receive upon "the presentation of the proper coupon." This was the view of Rives, judge, in Arents *vs.* The Commonwealth, 18 Gratt., 750. If the coupon was bought for the purposes of speculation or payment of taxes, and the coupon should be suspected or known to be fraudulent or counterfeit, the holder takes it subject to all equities, which the state might have against it in any hands. He is liable to any precaution or requirement that the state might exact to establish the *bona fides* of the coupon. These bonds, with these coupons as above indicated, have all the qualities and incidents of commercial paper. The coupons are payable to bearer; they are transferable by mere delivery; their very form indicates that they were designed to be put on the market; their very receivability for taxes and other characteristics were intended to promote their credit and make them desirable to business men. How can this be maintained, when their very genuineness is clouded with suspicion? In the last-named case, one of the points made against the bonds issued by the city of Wheeling, was that the coupons had been stolen after the day when they became due and payable, and objection was made to the plaintiff's title on this ground, and the principle was there settled, on page 777, that a party who takes a negotiable instrument like a coupon, by endorsement or delivery, gets no better title than the party from whom he received it; and where suspicion attaches to such instrument, that the necessity of the thing, from principles of public policy and convenience, require the prevention of frauds by detecting each particular instance of fraud, if possible, where there are any circumstances of fraud in the transaction, and while that case is not analogous to this, yet there runs, through the whole decision, the idea that for the furtherance of justice, where there are grounds for suspicion, the question of fraud, by proper legal proof, should always be left to a jury.

If the obligor of a bond has reason to doubt its genuiness, the courts authorize his plea of *non est factum*, which puts in issue the very execution of the instrument and its *bona fides;* so in the case of a mere promissory note, an I. O. U., or other simple contract in writing, where the promissor or maker doubts their integrity, proper pleas of *nil debit* or *non assumpsit*, according to the form of action adopted, may be resorted to, and a jury invoked to try the issue. This is all the commonwealth of Virginia has demanded for herself in the act under discussion. She merely claims for herself the same trial by jury that she accords to every private citizen within her borders, for the ascertainment of right and the discovery of wrong. She does not design to defraud her creditors, but to protect them; not to inflict injury, but to

prevent it; not to protect one at the expense of others, but to protect them also by the enactment of a law that will require the verification, proof, and identification of the real, lawful, and genuine coupons. It is said that no creditor has "a vested right to do a wrong," and in this case, no creditor has the right, moral, equitable, or legal, to distress the revenues of a state, by demanding the indiscriminate payment of securities, when it is an established fact that the markets of the country are flooded with fictitious instruments in the similitude of the genuine ones. Their very self-executing qualities, without the restraint of salutary judicial remedies, would prove the self-destruction of the state herself. It is supererogatory to say that every creditor, be he the holder of whatsoever class of security, must submit himself to the restraining remedial processes of courts, that merely modify his remedy, without substantially impairing its efficiency, but at the same time leaving the obligation of his contract intact.

In addition to the express, specific remedy allowed the creditor, by the act approved the 14th of January, 1882, a reference to chapter 44, Code 1873, page 416, will show that there is a general mode prescribed therein for the recovery of claims against the state or against corporations or boards or departments composed of the officers of the state government, and in that chapter it is provided that "where a person has any other claim against the commonwealth, redress may be had in the circuit court of the city of Richmond by a petition or by a bill in chancery; and by the second section of the said act it is provided that the auditor shall be made a defendant; that he shall file an answer stating his objection to the claim; and that the cause shall be heard without any *unnecessary delay* upon the petition or bill and answer and the evidence. The third section, in express terms, as in the act now under consideration, authorizes the court to cause a jury to be impanneled to ascertain *any* facts which may be disputed, or the amount of any claim which may be unliquidated; and that its judgment shall be such as the law, or its decree such as equity may require."

I refer to this to show how needless and unnecessary it was for petitioner in this case to resort to the rare, extraordinary, and expensive proceeding by *mandamus*, while he had at the same time the specific remedy named in the act, as well as the general remedy allowed by the general laws of the state, just recited to the court.

Why did not the petitioner, Antoni, follow the example of Higginbotham's executrix *vs.* The Commonwealth, in 25th Grattan, page 627, and proceed by petition in the circuit court of Richmond city; as the court therein decided that under this statute (meaning chapter 44 of Code of 1873) the state of Virginia may be sued for any debt or claim due, whether liquidated or unliquidated. It is well settled by all the

books that "the right to a particular remedy is not a vested right." The only exceptions to this rule are where the remedy is a part of the right itself, and are rare in their character. It has been decided by nearly every state court in this Union, that every state has complete control over the remedies which it offers to suitors in its courts; that it may abolish one class of courts and create another; it may give a new and additional remedy for a right already in existence, or it may abolish old remedies entirely, and substitute new ones. The only modification of this rule is that the right itself must not be taken away. "The obligation of a contract has been defined to consist in its binding force on the party who makes it." It cannot be impaired, but the remedy for the enforcement of that right is no part of the contract, provided there be left a sufficient means of enforcing that right. Cooley's Con. Lim., 2d ed., ch. 11, p. 361–2, and numerous cases there cited.

But I beg to remind the court that the act of the 14th of January, 1882, under consideration, was modelled after a bill passed by the General Assembly of Tennessee, and which has recently received the judicial endoration of the supreme court of the United States, in the case of Tennessee *vs.* Sneed, reported in 6 Otto, 96 vol. U. S. Reports, page 89.

That case and this are so completely similar that I will compare the cases as the strongest argument in behalf of this case.

In 1874 one Bloomstein presented his petition to the circuit court of Tennessee, sitting at Nashville, in which he stated that he was a taxpayer, and that, as such, he was assessed for state taxes for 1872 to the amount of $132 60; that he had tendered to Sneed, who was collector of taxes for the city of Nashville, in payment of his said taxes, the amount thereof as follows: $2 60 in legal tender currency of the United States, and $130 in bills of the Bank of Tennessee; that the same were funds receivable by law for the payment of taxes; that the funds tendered were originally made payable in gold or silver coin, and were embraced within the 12th section of the act chartering said bank in 1838, and which 12th section is as follows:

"Section 12. Be it enacted, That the bills or notes of the said corporation originally made payable, or which shall have become payable, on demand, in gold or silver coin, shall be receivable at the treasury, and by all tax-collectors and other public officers, in all payments for taxes or other moneys due the state."

He prayed for an alternative writ of *mandamus* to compel Snead, the collector, to receive the said bank bills in payment of his taxes, or to show cause to the contrary. To this writ the defendant, by the attorney-general of Tennessee, answered, and showed cause that by an act of 28th of February, 1873, the Legislature of Tennessee enacted as follows: "That no court has, or shall hereafter have, any power,

jurisdiction, or authority to entertain any suit against the state, or against any officer of the state, acting by authority of the state, with a view to reach the state, its treasury funds, or property; and all such suits now pending, or hereafter brought, shall be dismissed as to the state, or such officer, on motion, plea, or demurrer of the law officer of the state, or counsel employed by the state."

And that on the 21st of March, 1873, the said Legislature of Tennessee also enacted as follows: "That in all cases in which an officer charged by law with the collection of revenue due the state, shall institute any proceedings, or take any steps for the collection of the same, alleged or claimed to be due by said officer from any citizen, the party against whom the proceeding or step is taken, shall, if he conceives the same to be unjust or illegal, or against any statute or clause of the constitution of the state, pay the same under protest; and upon his making said payment, the officer or collector shall pay such revenue into the state treasury, giving notice at the time of payment to the comptroller that the same was paid under protest; and the party paying said revenue may, at any time within thirty days after making said payment, and not longer thereafter, sue the said officer having collected said sum, for the recovery thereof. And the same may be tried in any court having jurisdiction of the amount and parties; and if it be determined that the same was wrongfully collected, as not being due from said party to the state, for any reason going to the merits of the same, then the court trying the case may certify of record that the same was wrongfully paid, and ought to be refunded; and, thereupon, the comptroller shall issue his warrant for the same, which shall be paid in preference to other claims on the treasury." Section 2 of the act provides, "that there shall be no other remedy in the case of the collection of revenue, or attempt to collect revenue illegally, or attempt to collect revenue in funds only recoverable by said officer under the law, the same being other or different funds than such as the tax-payer may tender, or claim the right to pay, than that above provided; and no writ for the prevention of the collection of any revenue claimed, or to hinder or delay the collection of the same, shall in anywise issue, either injunction, *supersedeas*, prohibition, or any other writ or process whatever; but in all cases in which, for any reason, any person shall claim that the tax so collected was wrongfully or illegally collected, the remedy for said party shall be as above provided, and in no other manner." The act of March, 1873, provides, "that the several tax-collectors shall receive, in discharge of the taxes and other dues to the state, bank notes of the bank of Tennessee, known as the old issue, warrants on the treasury, legally outstanding, gold, silver, national bank notes, and nothing else."

The court will observe that by this act the bills or notes of the said bank of Tennessee possessed exactly the same attributes of receivability that are claimed for the coupons of Virginia, issued under the said funding bill of March, 1871.

The main dofence in Tennessee *vs.* Snead, was that the said acts of 1873, hereinbefore recited, were laws that impaired the obligation of the contract in the 12th section of the said bank charter, also hereinbefore recited, which provided that the said bills or notes of the said bank should be receivable by all tax-collectors in all payments for taxes due the state. It was claimed that the said impairment of said obligation was not by direct infraction, but by placing such impediments and obstructions in the way of its enforcement, by so impairing the remedies, as practically to render the obligation of no value. The case was taken to the supreme court of Tennessee, and the judgment of the court below, dismissing the petition, was there affirmed. From that judgment of affirmance, the case was carried by writ of error to the supreme court of the United States, and was again affirmed by a unanimous court, composed of Chief Justice Waite, Justices Clifford, Strong, Bradley, Swain, Harlan, Miller, Field and Hunt—the latter delivering the opinion of the court. The court reviewed all the decisions *pro and con*, bearing upon the question, and after a thorough review and discussion of them all, the rule laid down in Bronson *vs.* Kinzie, 1 How., 311, was reaffirmed, and the doctrine judicially enunciated, that "If a particular form of proceeding is prohibited and another is left or is provided which affords an effective and *reasonable* mode of enforcing the right, the obligation of the contract is not impaired."

That "the rule seems to be in the modes of proceeding and of forms to enforce the contract, the Legislature has the control, and may enlarge, limit or alter them, provided that it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the value of the right."

The remedy allowed Sneed and other tax-payers, in Tennessee, by the Acts of 1873, referred to, was decided by the court to be simple and effective. How much more simple and effective is the remedy given the holder of the Virginia coupon by the Virginia act of January 14th, 1882? The supreme court says that "a suit at law to recover money unlawfully exacted, is as speedy, as easily tried, and less complicated than a proceeding by *mandamus*. Every attorney knows how to carry on the former, while many would be embarrassed by the forms of the latter. Provision is also made for the prompt payment of the amount by the state if judgment is rendered against the officer on the merits."

A mere reading of the Virginia statute under consideration will demonstrate *a multo fortiori*, that the rights and remedies of the creditor

are more amply protected. The supreme court of the United States concluded, in the light of all the authorities, that there was no ground for the assertion of petitioner, that a speedy and effective remedy was not provided to enforce the claim set up by him.

It is proper to remind the court, in this connection, that the remedy by *mandamus* had existed in Tennessee long anterior to 1873, and that it was treated in Tennessee *vs.* Sneed as an extraordinary remedy, available only where there was no other effective remedy at hand.

I have, at some pains, ascertained that since the organization of the state government of Tennessee there never has been a day that this writ did not exist in that state until the passage of the act of 1873. As early as 1831 there was an act brought into the Code of that state, section 3,567, *et seq.*, which regulates the mode of issuance and practice under the writ of *mandamus*. It has always been considered there that their courts had the power to issue the writ in all cases where it was allowable at common law. The state could not be sued by *mandamus*, or in any other form, until 1855, when a general right of action was given against the state. The statute then enacted was carried into the Code, and is found in section 2,807; but it was repealed by 1865, 36–34. The right to compel any of the officers of that state by *mandamus* merely to perform ministerial duties, I feel sure, has always been recognized and was peecisely the same in 1838, previously thereto, and subsequently and continuously up to 1873, when it was repealed by the act of that year. The decisions of the court of Tennessee on the subject of *mandamus* are found in King's Digest, under the title of *mandamus*, and in the notes of Thompson and Steger's Revised Code, section 3,567. An examination of the foregoing will show that the doctrines laid down in Tennessee *vs.* Sneed, and Railroad Company *vs.* Tennessee, are equally applicable to Tennessee and Virginia.

The decision of Tennessee *vs.* Sneed, so conclusive of the case at bar, was rendered at the October term, 1877, of the supreme court of the United States; but I am fortunate in this, that in the very last reports of the decisions of the said court (vol. 101, 11th Otto), there are three cases, adjudged as late as October, 1879, seven years since the rendition of Antoni *vs.* Wright, in which the principles enunciated in Tennessee *vs.* Sneed, and relied on by the commonwealth in this case, are explicitly approved. I will recapitulate briefly the three cases. First, the Railroad Company *vs.* Tennessee, p. 337. In 1838, the state of Tennessee established a bank, pledged its faith and credit to indemnify for all losses arising from a deficiency in capital. She was a stockholder, and entitled to all the profits of the business. The bank was, by its charter, capable of suing and being sued. The state, by its constitution, article 1, section 17, was liable to be sued in such manner and in such courts as

the legislature might by law direct. In 1855, the Legislature of the state enacted—see Code, section 2,807—that suits might be instituted against the state under the same rules and regulations that governed actions between private citizens, process to be served upon the district attorney of the state. *While this remedy was in force*, the said bank, so indemnified by the state, contracted a debt to the Memphis and Charleston Railroad Company; after said debt was contracted, to-wit, in 1865, the Legislature of Tennessee repealed the law of 1855, which gave the remedy by suit against the state, and after that time there was no law prescribing the manner or the courts in which suits could be brought against the state. In 1272, the railroad company instituted proceedings setting forth the indebtedness due them from the said bank, and made the state of Tennessee and the bank parties, and sought to enforce the liability against the state, under the indemnity clause of the charter. The state by her attorney-general, appeared and demurred to the bill of the railroad, and assigned for cause, among others, that the State could not be sued. The chancery court at Nashville sustained the demurrer and dismissed the bill of the railroad. The case went, by appeal, to the supreme court of that state, where the decree of the court below was affirmed. It then was carried by writ of error to the supreme court of the Unitee States, and was there affirmed, Chief Justice Waite delivering the opinion of the court, upon the express ground that the repeal of the law by the Legislature of Tennessee, authorizing suits against the state, was valid and did not impair the obligation of the contract which the railroad had with the state; the reason assigned being, that the constitution protects only such remedies as are required to *enforce* the contract, and the state having given the remedy could withdraw it. Only two of the justices, Swain and Strong, dissented from the opinion.

Hard upon this case followed The Railroad Company *vs.* Alabama, reported on page 832. The South and North Alabama railroad company brought a suit in chancery at Montgomery against the state of Alabama, for a three per cent. fund claimed by the railroad under a contract and legislation made by the said state with the railroad in 1860. By the laws in force at the time of the contract, the state of Alabama was liable to suit, and when the proceedings of the railroad were begun, but before the final hearing thereof, the law giving the remedy was repealed. Upon the trial of the cause, on motion of the state, the suit was dismissed for want of jurisdiction. There was an appeal both to the supreme court of the state and the supreme court of the United States, and affirmances by both of the said courts—Justice Swain alone dissenting in the latter. The opinion of the latter court was that Alabama had not granted such a remedy for the enforcement of the con-

tract as that her sovereignty under the constitution of the United States could not take away.

The third and last case is found on page 814—Stone *vs.* Mississippi. In 1867 the Legislature of Mississippi incorporated the Mississippi Agricultural and Manufacturing Aid Society; and in consideration that said society would pay before the commencement of its business to the treasurer of the state, for the use of the University of the state, five thousand dollars and an annuity of one thousand dollars and one-half per cent. of receipts, the Mississippi Legislature, by the act of incorporation, contracted that the charter of the company should continue in force for the period of twenty-five years. The company complied with the contract until 1874, when the attorney-general of Mississippi filed his *quo warranto* to vacate the charter, upon the ground that by an act of the Legislature of 1870, such charter had been repealed under a subsequent constitution, adopted in 1868. The corporation contended that their charter was a vested right, granted in 1867, prior to the state constitution of 1868 and the repealing act of 1870; but the state court vacated the charter, and gave a judgment of *ouster* of all liberties, franchises, and rights thereunder. This was carried to the supreme court of the United States by writ of error, and there affirmed.

Chief Justice Waite denied that the legislature have the power to bind the state and succeeding legislatures. He said "irrevocable grants of property, &c., may be made, if they do not impair the supreme authority to make laws for the right government of the state; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." "No government, he says, on page 820, "dependent on taxation for support can bargain away its whole power of taxation, for what would be substantially abdiction; all that has been determined thus far is, that for a consideration, it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its power in this particular. The power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. The several agencies can govern according to their discretion, if within the scope of their general authority while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters, the government of which, from the very nature of 'things' 'must vary with varying circumstances.' The contracts which the constitution protects are those that relate to property rights, not governmental." Having commented upon and explained the Dartmouth college case, he concluded for the court, that the repeal of the rights of

the company did not impair the obligation of the contract, and consequently found that there was no error in the record.

The law of Virginia for the recovery of claims against the state is as limited as the laws of Tennessee and Alabama. The sixth section of chapter 44, Code of 1873, provides that no judgment or decree against the commonwealth exceeding $300, shall be paid without a special appropriation therefor by law. By an act approved March 13, 1875, in Acts 1874–5, page 253, the said sixth section is so amended as to read, "No judgment or decree against the commonwealth shall be paid without a special appropriation therefor by law."

It is true that by the 6th article, section 2, of the constitution of Virginia, it is provided that "the supreme court of appeals shall have appellate jurisdiction only, except in cases of *habeas corpus*, *mandamus*, and prohibition." This was not intended to be regarded as a vested power or right in that court to issue *mandamus* where no statute prescribed the mode of procedure, but was merely intended to give said court original jurisdiction in cases where the remedy of *mandamus* has been provided for by statutory law. Therefore, by chapter 157, section 4, of the Code of 1873, *mandamus* is only conferred where it may be necessary to prevent a *failure of justice;* in which case a *mandamus* may issue according to the principles of the common law. Then, I reaffirm, that this court has no jurisdiction by *mandamus*, because the petitioner had other plain, adequate and complete remedies at law, and there was no such failure of justice in this case necessary to be prevented. If any further reason is necessary to be added, I will call the court's attention to the fact, that since this proceeding by *mandamus* was instituted, the General Assembly of Virginia has passed, and the governor has approved, on the 7th day of April, 1882, the following act, which deprives the supreme court of appeals of jurisdiction by *mandamus* in cases similar to this:

1. Be it enacted by the General Assembly of Virginia, that chapter 156, section 4, of the Code of Virginia of 1873, be amended and reenacted so as to read as follows:

§ 4. The said supreme court, besides having jurisdiction of all such matters as are now pending therein, shall have jurisdiction to issue writs of *mandamus* and *prohibition* to the circuit and corporation courts, and to the hustings court and chancery court of the city of Richmond, and in all other cases in which it may be necessary to prevent a failure of justice, in which a *mandamus* may issue according to the principles of the common law: provided that no writ of *mandamus*, prohibition, or any other summary process whatever, shall issue, in any case of the collection or attempt to collect revenue, or to compel the collecting officers to receive anything in payment of taxes other than is provided in chapter 41, Acts of Assembly, approved January 26, 1882, or in any case arising out of the collection of revenue in which the applicant for

the writ or process has any other remedy adequate for the protection and enforcement of his individual right, claim, and demand, if just. The practice and proceedings upon such writs shall be governed and regulated in all cases by the principles and practice now prevailing in respect to writs of *mandamus* and prohibition, respectively.

2. This act shall be in force from its passage.

The foregoing cases referred to in 11 Otto, fully sustain the right of the General Assembly to pass such legislation, as does also the authorities referred to in Cooley on Con. Lim., 2d edition, page 363.

In Higginbotham *vs.* Commonwealth, the court decided that it could only adjudge Higginbotham's claim to be just and due, and that it ought to be paid, and that judgment should be rendered against the commonwealth, as a matter of course; but that the court *had no power* to control, or in any manner to interfere with the discretion of the Legislature in making provision for the payment of the debt. And the court held that, under the 6th section of chapter 44 of Code of 1873, the judgement being for more than three hundred dollars, it had no authority to require the auditor of public accounts to issue his warrant for the amount; and in such cases, the provision to be made for the judgment is expressly reserved to legislative discretion, and to that discretion we must leave it.

Now, by the Acts of 1874–5, page 253, the 6th section of chapter 44 is amended, and the words "exceeding three hundred dollars" stricken out, so that *no* judgment or decree against the commonwealth shall be paid without a special appropriation therefor. Therefore, the courts of Virginia, in the language of Chief Justice Waite, in the cases hereinbefore referred to, are but auditing boards for claims against the commonwealth. The principle is elementary that a state cannot be sued in her own courts without her consent. This is a privilege of sovereignty. Where a judgment has been rendered against the state, the liability of the state has been judicially ascertained, but their the power of the court ends, and the state is at liberty to determine for itself whether to pay the judgment or not. The courts are powerless. Everything after the judgment depends upon the mere will of the state. This is the doctrine laid down in the last decisions rendered by the supreme court of the United States, and reported 101st vol. U. S. Reports, and *ita lex scripta est*, is argument enough for the judicial mind.

With the foregoing views, fortified by the said authorities, I respectfully ask, on the part of the commonwealth of Virginia, that the prayer of said Andrew Antoni, for a peremptory *mandamus*, may be refused, and that his petition may be dismissed at his cost.

F. S. BLAIR, ATTORNEY-GENERAL,
For the Treasurer and the Commonwealth of Virginia.

U. S. CIRCUIT COURT FOR THE WESTERN DISTRICT OF VIRGINIA.

THE BALTIMORE AND OHIO RAILROAD COMPANY

v.

S. B. ALLEN, AUDITOR OF PUBLIC ACCOUNTS OF VIRGINIA; DAVID R. REVELEY, TREASURER OF VIRGINIA; AND JOHN ED. HAMILTON, TREASURER, RESIDING IN THE COUNTY OF AUGUSTA, VIRGINIA.

IN EQUITY, ON MOTION FOR A PRELIMINARY INJUNCTION.

STATEMENT OF THE CASE.

The railroad which reaches from the border of Virginia beyond Winchester to Staunton is owned by four several companies, but it is operated by the Baltimore and Ohio Railroad Company, the complainant in this cause. The part between the State border and Winchester is owned by the Winchester and Potomac Company; that between Winchester and Strasburg is owned by the Winchester and Strasburg Company; and that between Strasburg and Harrisonburg, by the Virginia Midland Company. These three roads are under lease to the complainant. The road between Harrisonburg and Staunton is owned by the Valley Railroad Company, and is operated by the complainant. The four roads are operated practically as one line by the complainant; none but its own locomotives, cars, and trains being used upon them; and the complainant having the exclusive control of the running of the trains in all the business which is conducted. These roads are all leased by the complainant, except the Valley railroad, which seems to have a contract by which it has reserved the privilege of employing its own depot agents to collect freights, and its own conductors on passenger trains to collect tickets and fares; but the conductors are employees of the complainant for performing

the same duties over the entire line. All four of the roads have as a common treasurer W. H. Ijams, who resides in Baltimore, and has his office in Baltimore.

These railroads were assessed for State taxes in December, 1882, by the Board of Public Works of Virginia, in pursuance of section 20 of chapter 118 of the Acts of 1881–2, page 506. That section, after requiring certain annual reports from railroad companies, provides as follows in regard to railroads:

"Upon the receipt of every such report, it shall be the duty of the Auditor of Public Accounts to lay the same before the Board of Public Works, who shall * * * * * proceed to ascertain and assess the value of the property so reported, upon the best and most reliable information that can be procured, and to this end shall be empowered," &c., &c. "A certified copy of the assessment, when made, shall be immediately forwarded by the secretary of the board to the president or other proper officer of every railroad * * * company so assessed, whose duty it shall be to pay into the treasury of the State, within sixty days ofter the receipt thereof, the tax which may be imposed thereon by law. A company failing to * * * * pay the tax assessed upon its property shall be immediately assessed, under the direction of the Auditor of Public Accounts, by any person appointed by him for the purpose, rating the value of their real estate and rolling stock at $20,000 per mile, and a tax shall at once be levied on such value at the annual rate" of forty cents in the hundred dollars.

The amount of the assessment made under the first provision of this law was based on a valuation of $15,000 a mile; and was, for the three leased roads, $4,818 12; and for the Valley road $1,593 04; making a total of $6,411 16. Notice was given during the first week in December, to W. H. Ijams, treasurer, in Baltimore, of this assessment. This notice was repeated during the week which commenced on the 15th January, 1883. The taxes so notified to be due were not paid within sixty days after the notices were sent. On this failure of payment the Auditor of Public Accounts again assessed these roads in accordance with the second provision of the law above cited, "rating their real estate and rolling stock at $20,000 per mile." This second assessment, of course, added 33⅓ per cent. to the former one. In pursuance of the same provision of law, John E. Hamilton, treasurer of the county of Augusta, "appointed by the Auditor for the purpose," proceeded to make a levy for the several amounts of tax thus assessed by the Auditor on the following property of the complainant, viz: on twenty-two freight cars at Winchester; on one engine and fifteen freight cars at Harrisonburg; and on twenty-four freight cars at Staunton. He also levied on an iron safe and some furniture of the Valley company at Staunton, which was all the personalty of that company which could be found. The levies at Staunton and Winchester were made on the 23d of March, and that at Harrisonburg on the 24th of March last.

On the 16th of March, 1883, agents of the complainant had appeared at Richmond and tendered tax-receivable coupons of interest alleged to have been cut from bonds issued by the State of Virginia in payment of the several amounts of taxes due under the first assessment that has been described. The tender was made first to the cashier of a bank having deposits of the State under a warrant of the treasurer authorizing the bank to receive the amounts of money due for taxes, and was refused. It was then made to the treasurer

and the Auditor of the State successively, who each refused the coupons. The agents did not tender the taxes in gold, silver, United States treasury notes, or National bank notes, which are required to be paid in the discharge of taxes by the act of January 26th, 1882; chapter 41, section 1, page 37, Acts of 1881–2, nor did they deliver or offer to deliver the coupons for verification as required by the act of January 14, 1882, chapter 7, page 10 of the same volume.

Complainant now brings this bill into this court in which S. Brown Allen, as Auditor of Public Accounts of Virginia; David R. Reveley, as Treasurer of Virginia; and John E. Hamilton, as treasurer, residing at Staunton, who is treasurer of the county of Augusta, are made the parties defendant.

The bill recites certain acts of the General Assembly of Virginia declaring that coupons of interest, such as those tendered by complainant, shall be receivable in discharge of all taxes and dues to the State; avers the tender of coupons made on the 16th of March, which coupons are now brought into this court; and complains among other things of the seizure of its cars and an engine by Hamilton, the defendant; of irreparable injury sustained; of cloud upon title resulting from illegal levy; of threatened multiplicity of suits; of obstruction in the performance of its duties to the public as a common carrier, and of the penalty inflicted upon it by the second assessment. The bill prays that the said Hamilton may be forever enjoined from further proceeding under the levies he has made; that the court will decree that the taxes first assessed were by the tender of the coupons and by the bringing them now into this court, paid off and discharged, and that the second assessment and the levies made under it were null and void. On the filing of the bill a motion was made by complainant for a preliminary order enjoining further proceedings under the second assessment, and enjoining the sale of the property levied upon. It is that motion which the court has now to deal with.

OPINION OF JUDGE HUGHES.

This is a suit against the State of Virginia, brought in a forum in which she has not consented to be sued in the manner chosen by this complainant. A suit against the public officers of a State, as such, seeking to control the funds of the State in their custody, or to "compel them to do acts which constitute a performance of its contract by the State," is a suit against the State itself. It is useless to cite authorities on this point. Suffice it to refer to the cases of *Louisiana* v. *Jumel*, *Elliott* v. *Wiltz*, and *Antoni* v. *Greenhow*, decided by the United Supreme Court at the term just ended, and not yet reported. This suit is brought, therefore, in apparent violation of the Eleventh Amendment of the National Constitution, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State." It is true that the gravemen of this suit is the allegation that the State, by the action of her officers, the defendants, and by the laws under which they acted, has violated that provision of the National Constitution (Article 1, section 10, clause 1), which declares that "no State shall pass any law impairing the obligation of contracts." But this provision was part of the original Constitution (Article 3, section 2, clause 1), which declared that "the judicial power of the

United States should extend to controversies between a State and citizens of another State," a clause that was held, in *Chisholm* v. *Georgia*, 2 Dallas, 410, to empower the citizen of another State to sue a State of the Union without its consent in a Federal court. It was to correct this evil that the Eleventh Amendment of the National Constitution was adopted, and it is, or ought to be, obvious law, that unless a State grants the right to be thus sued the right has ceased to exist; and that, if she grants it, the right can only be exercised in the manner in respect to which it shall have been granted. The Eleventh Amendment gives the State entire control of the remedy, so far as it concerns a Federal court, which it may grant or withhold at its sovereign pleasure; and this power over the remedy being granted by the Eleventh Amendment, exists in full force; the clause in the original Constitution, forbidding the impairment of contracts, to the contrary notwithstanding. The State of Virginia has not granted the right to be sued in the Federal courts upon her contracts, except as to a remedy at law to be mentioned in the sequel; and, therefore, this court would seem to have no jurisdiction of the present cause, which is a suit in equity.

It is true that the Supreme Court of the United States, in *The Arlington case*, cited by complainant's counsel (*United States* v. *Lee*, 106 U. S., 196), affirming this court in S. C., 3 Hughes, 37, held that the United States might be sued in the persons of its officers, under circumstances which the court was careful to define. But in explanation of this ruling two things may be said, to-wit: The Eleventh Amendment does not forbid a suit against the United States; and 2d, the National Constitution provides in Amendment Fifth that "no person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." The immunity of the United States from suit is that which adheres in sovereign power, as shown with such trascendent ability by Lord Somers in *The Bankers' Case*, 5 Modern Reports, 29–62. This power would have been absolute, except for this controlling and qualifying provision of the Fifth Amendment. In the case of the *United States* v. *Lee*, property had been taken without just compensation, and the immunity of the United States from suit had, of necessity, to be qualified in pursuance of this express inhibition of the Constitution as amended; and so the suit of the dispossessed owner of Arlington was entertained.

But neither this provision of the National Constitution, nor this inherent attribute of sovereignty, applies in the case at bar. The immunity of States from suit in the Federal courts is an express constitutional canon; and the sale of private property for public taxes is not an appropriation of property without just compensation, or without due process of law. Whether, therefore, as to such appropriations, or as to contracts, it is plain that the States have immunity from suits in United States courts under the Eleventh Amendment, and this suit does not lie. Nor can it be sustained on other grounds.

Injunctions to restrain the collection of public taxes are contrary to public policy. In granting them the judicial department of government brings itself into conflict with the executive in the discharge of one of its most important functions, and violates the comity which should be observed between departments essentially distinct and independent in their respective powers and

duties. The Legislature of Virginia very jealously prohibits the State courts from granting injunctions in restraint of the collection of State taxes; and Congress, in section 3224 of the Revised Statutes of the United States, forbids, in sweeping terms, "any suit" for enjoining the assessment or collection of "any" Federal tax from being maintained in "any court."

When, therefore, a Federal court, evading both these inhibitions, impliedly binding on it, assumes to enjoin a State in the collection of her public taxes, unless impelled by the most exigent circumstances and justified by the most cogent reasons, its transcends its proper sphere of jurisdiction, violates comity, and commits a trespass upon the most vital rights of the States. The Supreme Court of the United States has repeatedly condemned such proceedings, more especially in cases similar to the one at bar. *State Railroad Tax Cases*, 92 United States, 613 to 617; *Dow* v. *Chicago*, 11 Wal., 108; *Hannewinkle* v. *Georgetown*, 15 Wal., 547.

Since the 29th of March last, for a period of more than six weeks, this court has stood between the State of Virginia and the collection of an important part of her public revenues. One of the proceedings in which she interfered, viz: the suit which was commenced in replevin, was found to be unauthorized by law, and the court abandoned it after two weeks of obstruction. Thereupon the present proceeding was instituted, which has been pending since the 16th of April. Complainant's counsel endeavor to justify it on various grounds; some of them merely technical and nominal, others more deserving of serious consideration.

I will consider the more serious grounds of complainant set out in the bill. But, before dealing with them, I will first mention an obstacle in the way of this proceeding which constitutes a formidable bar to the relief sought.

Interference by a court of equity with the collection of taxes is always discouraged because of the inability of the chancery court to afford complete relief in the premises. It has no power to correct errors and repair mistakes in assessments; that being distinctly and exclusively a function of the executive. It has no jurisdiction to set the taxing machinery of the government in motion for the purpose of making levy and enforcing a legal tax in the event the tax complained of being found to be illegal or unconstitutional. It is powerless to apportion a tax—ratifying the part that is legal and nullifying the part that is illegal. It has no power to make a new assessment or direct its collection by the proper officer. It can obstruct, but it is hopelessly impotent to accomplish what is rightful to be done; and a court which has power merely to obstruct is always slow to proceed at all. There could not be a more striking illustration of the imbecility of this court in such a cause as the present one for any but an obstructive purpose, than was given the other day by the production at bar and proffer to the court of the coupons and silver that had been tendered by complainant for these taxes. How could we know which of the coupons were spurious and which were genuine; and, as to the former, how could we consent to become the depositories of contraband debentures. That some of the coupons are spurious is certified to us by the Legislature of Virginia in the recitals of the act of February 14, 1882, entitled an act to ascertain and declare Virginia's share of the public debt.

Suppose we assume jurisdiction of this suit, and also of others pending here, in which jurisdiction is claimed for us in all coupon cases whatever, under section 1979 of the Revised Statutes, and under chapter 137 of the Supplement to the Revised Statutes,—the court would become the depository of hundreds of thousands of dollars in nominal value of these coupons, with no authority to do anything with them, and no jurisdiction to administer complete justice between the State of Virginia and the owners of them. The court should be slow to enter upon a proceeding which can end in no sound and perfect judicial result.

Passing from this obstacle to that complaint of the bill on which counsel lay the greatest stress, complainant avers that it had a right, under former laws of Virginia which embodied contracts with her creditors, to pay the taxes now under consideration in such coupons of interest as were tendered in this case, and that it was prevented from doing so by the observance on the part of the State's revenue officers of the provisions of the Act of Assembly of Virginia passed January 26, 1882, (Acts of Assembly 1881–'82, chapter 41, page 37), which allow payment in gold, silver, and treasury and bank notes only. Complainant denies the constitutionality of that act, and therefore prays that the officers seeking to collect taxes under it may be enjoined from so doing. The hearing of the present motion for a preliminary injunction, based as it is on the question of the constitutionality of this act, is therefore equivalent to a final hearing on the merits of the bill.

The act of January 26th, 1882, now assailed, is auxiliary to that of January 14th, 1882, (Acts of 1881–'82, chapter 7, pages 10, 11, 12), and must be considered in connection with it. The Supreme Court of the United States in the case of *Antoni* v. *Greenhow* has decided the act of January 14th to be constitutional; and has but a few days ago refused a rehearing of that case. We have therefore, some firm ground to stand on. In order to a comparison of them, I will set out the substance of each of these acts. The Supreme Court described the act of January 14th as follows:

"Sections 1, 2, and 3, of the act of 1882, provide in substance that if coupons are tendered in payment of taxes the collector shall take and receipt for them for the purposes of identification and verification. He shall then require payment of the taxes in money, and after marking the coupons with the initials of the name of the owner, shall deliver them to the judge of the county court of the county, or hustings court of the city, where the taxes are payable. The tax-payer may then file his petition in the county or hustings court against the Commonwealth to have a jury empaneled to try whether the coupons are genuine, legal coupons, which are legally receivable for taxes, debts, and demands. The Commonwealth may be brought into court by service of a summons on the Commonwealth's attorney. Upon this petition an issue and trial by jury is to be had, with ample privileges to all parties of exception and appeal. If the suit is finally decided in favor of the tax-payer, he is to have the amount paid by him for the taxes refunded out of the first money in the Treasury in preference to all other claims."

Of these clauses of the act thus set out in substance by itself, the Supreme Court spoke when it said: "A remedy which is ample for the enforcement of the payment of the money [which the act provides shall be refunded to the

coupon-holder by the State Treasurer] is ample for all the purposes of the contract. That, we think, is given by the act of 1882 in both forms of proceeding." Thus we have the distinct and irreversible decision of the Supreme Court of the United States, that the remedy of the coupon-holder afforded by the three first sections of the act of January 14th, 1882, is inadequate; and that those three sections are ample to discharge the constitutional obligation of the State in respect to the remedy supplied to the coupon-holder. We come, therefore, to the act of January 26th, 1882, whose substance I will state.

That act, after requiring that nothing but gold, silver, United States treasury notes, or national bank notes, shall be received for taxes, goes on to provide that "in all cases in which an officer shall take any steps for the collection of revenue claimed to be due the State from any citizen or tax-payer," such person, if he conceives the same to be unjust or illegal, or to be unconstitutional, &c., may pay the same under protest, and, on such payment, the officer collecting the same shall pay such revenues into the State treasury, giving notice to the treasurer that the same was paid under protest. It gives the protesting tax-payer leave, within thirty days after such payment under protest, to sue the collecting officer for the amount which had been paid, in "the court having jurisdiction of the parties and amounts."

If, in such suit, it be determined that the money was, for any reason going to the merits, wrongfully paid, and ought to be refunded, it provides that the court shall so certify of record, and that the Auditor of Public Accounts shall issue his warrant for the amount, and that such warrant shall have preference of payment over other claims upon the treasury, except such as have priority by constitutional requirement. It provides that this shall be the only remedy "in any case of the collection of revenue, or the attempt to collect revenue illegally, or the attempt to collect revenue in funds only receivable [meaning *in such funds only as are receivable*] by said officers under this law, the same being other than and different funds than the tax-payer may tender or claim the right to pay."

It takes away from the tax-payer the remedy by injunction, *supersedeas mandamus*, prohibition, and all other remedy than that of suing the tax-collector as provided by this act. Observe that the clause just recited refers only to what occurs in cases of the *compulsory collection* of the revenue under the act of January 26th, and does not refer to what occurs in cases where the tax-payer comes voluntarily forward to pay, as contemplated by the act of January 14th.

The act goes on to make it misdemeanor, punishable criminally, for the collecting officer to receive other funds than gold, &c. After some immaterial provisions the act finally provides that no officer shall be subjected to any other suit than the one itself provides for any refusal on his part to accept payment of taxes in funds not authorized to be received by the act.

It is to be observed that this act comes into operation only where the tax-payer "stands passive," and puts the State to the necessity of "taking steps for the collection of taxes due." It then forbids the receipt of coupons in payment, requires payment in gold, &c., and allows the coupon-holder, after paying taxes in gold or other money, to sue the collector for the return of the money paid him. As before said, it allows him to pay under protest, and requires the collecting officer to notify the State Treasurer of the protest. The

suit may be brought in a State court; or, if proper circumstances of jurisdiction exist, it may be brought in a Federal court; and the court may pass upon the validity of the tender of coupons, with reference either to the constitutionalty of the act in forbidding the reception of them, or to the genuineness or spuriousness of the coupons tendered, or with reference to any other question going to the merits.

The fundamental error of complainant's counsel consists in assuming that this act of January 26th repeals that of January 14th. It evidently does not do so in terms, but counsel insist that it does so by implication. On the contrary, I think that by necessary implication there is no repeal. The act of January 14th provides a means of availing of coupons in payment of taxes for "any tax-payer," "whenever he shall tender" to the proper collector "coupons detached from bonds of the Commonwealth." This applies to every tax-payer. It grants him the remedy given by sections 1, 2, and 3, "whenever he shall tender" his coupons. He may make this tender at any time before "steps are taken to collect his taxes coercively. He may make it after such "steps have been taken;" after he has brought suit against the collecting officer; and after the court in which he thus sues has passed favorably upon it.

On the other hand, the act of January 26th applies only to cases in which a collector of taxes has "taken steps" for their compulsory collection. The earlier act applies to voluntary tax-payers. The latter act applies only where the tax-payer has failed to avail of the remedy given by the earlier, and has slept upon his duty as to taxes until aroused by a levy upon his property for them. The act of January 14th covers cases where the tax-payer holds out his hands to pay the State. The act of January 26th covers cases where the State reaches forth her hand to collect from the tax-payer the tax which he neglects to pay. So far from conflicting with each other these statutes go hand in hand, and are not only consistent, but mutually assistant. The tax-payer who schemes for time and delay may, as complainant's counsel express it, "stand passive," until the collecting officer approaches with his warrant of distraint. Aroused and coming forward, then, the tax-payer may pay in money under protest, and at once sue the officer for refusing coupons. If he succeed in his suit he will get back his money from the State Treasurer and still avil himself of his rights under the act of January 14th, for his taxes will still remain unpaid.

The act of January 26th does not, as complainant's counsel assert, take away "all remedies" from the tax-payers, against whom "steps have been" taken for compulsory collection. It only takes away injunction, *mandamus*, and the ordinary common law remedies. It leaves the right to petition under the earlier act, which the Supreme Court decides to be ample in its provisions for the enforcement of the tax-payers' rights in respect to the coupons; and it leaves the right to sue under its own provisions for the restoration of the gold, silver, or other funds, which have been paid under protest.

Nor does the act of January 26th deprive the tax-payer of the action of trespass against the collector for an illegal levy. It, in terms, only deprives him of the right of suing such collector for a "refusal on his part to accept in payment of the revenue" the coupons or other funds, not gold, &c., which he may have tendered.

The act affords no protection to Hamilton, the defendant, in this case, who made the levy on complainant's property, for no coupons have ever been tendered him or other funds contraband under this law, and the act only protects him from suit for refusing such funds.

I repeat, that the act of January 26th does not repeal that of the 14th. It does not repeal expressly. It avoids to do so in terms, and it, by necessary implication, continues the earlier act in force; even reinforcing it by its own provisions. If it does not repeal the earlier act, then, even though it did not itself afford a remedy to the tax-payer, enabling him to exercise his constitutional privilege of paying his taxes in coupons, the Supreme Court has decided that the act of the 14th does afford an ample remedy; and it is not incumbent upon the State to afford more than one ample remedy for any right. If it afford no independent remedy, then the narrowest construction that can be put upon the act of the 26th is, that it operates as a limitation; shutting off the right of the coupon-holder to pay his taxes in coupons, if he neglects to avail himself of the remedy afforded by the act of the 14th, and "stands passive" until his property is distrained for taxes.

The State has a right, after providing for its creditor ample remedy for enforcing an obligation of contract, to require by statute of limitation a reasonably prompt exercise of that right, and this period may, in respect to public taxes, be measured by weeks or days. Therefore, even though the law of January 26th could be held to shut off the tax-payer from paying his taxes in coupons after steps have been taken for their coercive collection, still it is constitutional, and leaves the tax-payer all the remedy to which he is entitled.

But this law is more than one of limitation. It affords the tax-payer an additional remedy to that given by the act of January 14th. The Supreme Court of the United States has virtually so pronounced, for the act is drawn in language almost identical with that of Tennessee, which was construed by the court in *Tennessee* v. *Sneed*, 96 U. L., 69. It is a copy of that act. Its effect as to coupons is identical with that of the Tennessee statute as to State bank notes, and the point made as to its constitutionality is the same that was raised by Bloomstein and decided against him in that case. And so it is that Virginia has put two acts upon her statute-book, constitutional and affording remedy to the coupon-holder. The act of January 14th has received the express sanction of the Supreme Court in *Antoni* v. *Greenhow*. The act of January 26th has received that court's equally emphatic sanction in *Tennessee* v. *Sneed*.

It is to be observed, furthermore, that the language of the clause of the act of January 26th, referring to the court in which a tax-payer may sue the tax-collector, is broad enough to give jurisdiction to the Federal court, and to relieve this class of suits of the inhibition of the Eleventh Amendment. The clause confers the right to bring such suits in any court having jurisdiction of parties and amounts; so that, whenever the tax-payer is a non-resident and the amount of taxes due equals or exceeds the sum of $500, a circuit court of the United States would seem to have jurisdiction. Indeed, the jurisdiction may embrace all cases included in the class defined in the first section of chapter 137, page 173, of the Supplement to the Revised Statutes of the United States. In the present case the complainant company could have paid the taxes under

protest to Collector Hamilton, and could then have sued this collector on the law side of the circuit court for the Western District of Virginia in the mode prescribed by the act of January 26th.

If the statute gives the remedy at law in the Federal court, of course, the tax-payer has no other; his remedy in equity being barred by the Eleventh Amendment and by the rule that where there is a remedy at law, equity can give none. The Supreme Court of the United States, in *Tennesse* v. *Sneed*, construing precisely such a law, held that the act furnished a remedy to the tax-payer, and did not impair the contract by taking away injunction and *mandamus*. The act nowhere seeks to confine the prosecution of the remedy to the State courts. If the amount and other circumstances of the case are such as to give Federal jurisdiction, nothing prevents the pursuit of the remedy at law in this court as freely as in all cases it may be pursued in the State courts. Such being the case, the very definition of equity, that "it is the correction of that wherein the law, by reason of its universality is deficient," seems to forbid our allowing equity to be invoked in this case in which relief at law is adequate and complete.

Summing up what I have said on this act of January 26th, the Eleventh Amendment denies to complainant a remedy in the Federal court, unless the State of Virginia grants the right to be sued in that forum. If she grants that right in a particular manner, no other manner can be pursued in exercising it. Having granted it in the manner prescribed by the act of January 26th, and that remedy being a remedy at law, complainant should have followed the method there prescribed; and, having been provided only with a remedy at law, complainant would have no right to resort to equity, even though the Eleventh Amendment did not bar its doors against him. Therefore the proceedings in equity which the complainant has instituted here cannot be maintained.

I will now pass on to the minor grounds of complaint relied upon in the bill, one of which is, that a penalty is inflicted by the second assessment on which the levies for these taxes were made; an increase of a third having been imposed in consequence of complainant's delay in paying the lesser tax first assessed. The fact that the second assessment, based as it was on a valuation of $20,000 per mile, proved to be greater than the first, is an accident which arose out of the peculiar circumstances attending the valuation of these particular roads. The act of April 22, 1882, requires the Board of Public Works to make the first assessment from the "the best and most reliable information that can be procured;" and is in all other respects silent as to the rate of valuation at which the first assessment shall be made. It nowhere requires, indicates, or implies that this assessment shall in all cases be at a rate of valuation less than $20,000 per mile. The Board of Public Works is required to make it from the best and most reliable information at hand. The Board may make it at the rate of $15,000 or $150,000 per mile, so far as the law is concerned; but whether the first assessment be made on the basis of fifteen, or one hundred and fifty, or forty, or ten thousand dollars a mile, if the company assessed fail to pay the tax resulting, within sixty days, then the act requires that a second assessment shall be made by the auditor, and fixes the arbitrary valuation, of $20,000 a mile, as the basis of it.

This provision of law is not penal, either in its terms, its spirit, or its legal effect. The only ground on which the second assessment is open to objection, with reason, would be, that the valuation of $20,000 is excessive. This is not alleged by the bill. It is notorious that such an averment could not be made with truth; and the bill refrains from making it. The assessment is strictly legal and is not penal. By the accidents of this case the second was larger than the first assessment, and a mere hardship has resulted: resulted too from the laches of the camplainant. Equity does not relieve from hardships of this sort, which a reasonable diligence on the part of the complainant could have averted. *Vigilantibus non dormientibus* is applicable here. Self-imposed burdens are not grounds for equitable relief.

Other of the minor complaints of the bill are urged in conformity with the ruling of the Supreme Court of the United States in *Hannewinkle* v. *Georgetowu*, 15 Wal., 547, in which the court held that a bill to restrain the collection of a tax cannot be maintained on the sole ground of the illegality of the tax; but required that there should be either an allegation of fraud, or that the tax sale would bring a cloud upon title, or that a multiplicity of suits would be prevented, or that some other cause presenting a case for equitable relief existed.

The bill, with industrious fidelity, conforms to every suggestion of the court in this case, alleging *seriatim* each of the grounds expressly named, and reinforcing these with other grounds numerous enough to satisfy the most exacting requirements in that regard. It charges fraud upon the officers of the State in the assessment of this tax. It sets out no facts creating a presumption of fraud, and throwing upon the officers the burden of rebutting its allegations, but employs only general averments. The first assessment upon the four railroads was made by the Board of Public Works, at the rate of $15,000 a mile, "from the best and most reliable information that could be procured." This was in strict compliance with the direction of section 20, of the act of April 22. 1882. The tax not having been paid within the period prescribed, the Auditor, in strict compliance with the same law, made the second assessment at the rate of $20,000 a mile. The latter proceeding was expressly, positively, and peremptorily required by law, and the officer would have been derelict in duty, and would have subjected himself to the imputation of fraud, if he had not made the assessment. A third officer was deputed, in exact conformity with the same law, to collect, and took the steps for collecting the tax, in doing which this court has obstructed him. Now, the presumption is always in favor of the regularity and validity of the conduct of officers engaged in the performance of their official duties, and equity will not enjoin them upon general averments that the assessment was too high. Indeed, in all cases in which fraud is relied upon, the especial facts constituting the fraud must be set forth. Distinction must also be taken between cases in which there is an entire absence of authority in law on the part of taxing officers, and cases of mistaken or wrongful execution of powers conferred by law; and the rule is that where the officer acts under valid authority, and acts within its limits, he will not be enjoined, although errors may have occurred in the exercise of the power conferred. In the case before us these conditions are not supplied, and the averment of fraud is untenable.

Another complaint is that the levies made upon complainant's property, and the sales of it advertised, create a cloud upon the title of the real estate of the four railroad companies, for the taxes due from which the levies were made. If the companies owning these railroads were themselves before the court as parties to the bill, the court could hear this complaint; but coming as it does from a complainant which expressly disclaims title in the real estate referred to, it cannot be entertained. Besides, this doctrine of cloud of title applies only in cases where real estate is to be sold, and sold under proceedings which are in fact illegal, but which do not show the illegality on their face. It applies only where a court is about to sell an illegal title to real estate, and where the illegality is not to be found in the record of its proceedings. Here it is not real estate, the sale of which is sought to be enjoined, but personalty, and the objection is untenable.

It is also complained that a multiplicity of suits will result from the sale of this property for these taxes. The bill does not set out with any precision *how* such a result will follow. It is certain that no multiplicity of suits yet exists. The better doctrine on this subject is, that the mere apprehension of suits not yet brought will not justify the interference of equity. In general, injunction of one suit is only granted where a multiplicity of suits are actually pending, all of the same character, and involving the same question of law. The bill refers to suits about to be instituted by the other railroad companies of the State, involving this right to pay taxes with coupons; but none of them have been instituted, and the proof is that all the companies but this complainant have paid their taxes in money. Therefore, as to other railroad suits, even the apprehension of them is wanting.

As to the liability of the complainant company, as trustees for its stockholders, to actions by them for taxes, paid in money, or by sale of property, which it has voluntarily tendered in coupons, the vague apprehensions of suits so improbable and remote, and which would be so untenable if brought, is not worthy of the consideration of the court. So of the equally vague apprehension intimated in the bill, of suits that might be brought against complainant as a common carrier, in consequence of its failure to serve the public effectually, because of a temporary subtraction from its rolling stock of some sixty freight cars and a locomotive. The probability of a great company, owning thousands of freight cars, and probably thousands of locomotives also, being sued for breach of its contracts as a common carrier, by reason of so diminutive a loss of rolling stock, is too remote to be considered by the court, especially as it is not averred that a single suit of the kind has yet been brought.

It is also complained that the treasurer of Augusta county, John E. Hamilton, one of the defendants, who, or his deputy, made the levies, and the seizures of property in this instance, is not pecuniarily responsible for a wrongful sale of this property in the damages that might be recovered from him in trespass; his assessed estate being only of the value of some $4,500. The argument of the bill on this head is, that as this same defendant was about to make similar levies on the property of other railroad companies the damages accruing to all would exceed any possible assets which he might possess for the satisfaction of them. But the proof in the case is, that all the other railroad companies have paid the taxes due from them. There is no possibility therefore of

any such suits, and the premises of the bill are at fault in this particular. It does not appear that Hamilton will be sued for any other seizures than those made in this case, and as it appears that he guided himself in his action by the direction of the law under which he was acting, his liability is covered by his official bond, which was stated at bar to have been given in the penalty of $200,000. The danger of loss to the complainant in this direction is not, therefore, so probable as to be worthy of the court's consideration in the present case.

The complaint just mentioned is made in aid of another complaint of the bill, that irreparable injury will be inflicted upon the complainant by the sale of the property under seizure. The Baltimore and Ohio railroad company is too wealthy and powerful to be irreparably injured by these seizures, except, comparatively speaking, to a most diminutive extent. The injury could have been averted in the first instance by taking the steps pointed out by law for verifying the coupons with which the complainant sought to pay the taxes—a law recently pronounced valid by the Supreme Court of the United States. Even now the measure of irreparable injury threatened, is that which would result from first tendering the coupons and advancing the amount of the taxes in money, and then obtaining a reimbursement of the money advanced by having the coupons verified according to law. Any injury with which it is threatened is reparable by the procedure instituted, which the court is bound to consider as having been provided in good faith. The court, therefore, must disregard complainant's apprehension of an irreparable injury which seems to have been self-imposed.

A sale of complainant's property by due process of law for the satisfaction of taxes, which may be avoided by complying with a law which, however onerous it may be in respect to men of small means, who are required to verify very small amounts of coupons, yet subjects holders of large amounts to neither an onerous nor an unreasonable proceeding for verification, cannot be regarded as inflicting an irreparable injury either practically or theoretically.

Still another complaint of the bill is the interruption which the seizure of its rolling stock is alleged to produce in the performance of complainant's duties to the public as a common carrier. If the four companies owning these local railroads were complainants, and if they owned only the quantity of rolling stock properly belonging to short local roads, these seizures might be really amenable to the complaint of the bill in this particular. But the complainant is one of the most wealthy railroad corporations in the world, having unlimited command of all the appliances and instrumentalities for conducting the immense business of its main stem and the auxiliary roads under its control. Its operations are on so large a scale as to be part of the public history of the times, and the court may take judicial cognizance of the amplitude of its resources as to rolling stock. It is hardly possible to believe that the complainant's power to serve the public as a common carrier is appreciably affected by the, to it, inconsiderable levies made by Hamilton, the defendant in this case; and this complaint is untenable.

All these minor complaints seem to me to be frivolous; and hardly worthy of the serious attention I have given them. They certainly are not sufficient to justify an injunction against the collection of public taxes.

What the circuit judge may do with this motion I know not; but, presented to me, sitting alone, as it now is, I think the case is ruled by *Antoni* v. *Greenhow* and *Tennessee* v. *Sneed;* and I am constrained to deny the motion for a preliminary injunction.

A few days after this decision was rendered, the Circuit Judge, Hon. Hugh L. Bond, granted the motion for a preliminary injunction; basing his action upon reasons set out in an opinion filed in the cause.